


77243



Digitized by the Internet Archive
in 2010 with funding from
CARLI: Consortium of Academic and Research Libraries in Illinois

NOV 8 '60

37152

8/60
53

HOWARD COOKSON LANG and
LAURA E. LANG, his wife,
Appellees,

v.

WILLIAM F. PELHAM COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

277 I.A. 609¹

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 18, 1932, plaintiffs filed a statement of claim in assumpsit, containing the common counts and a lengthy affidavit of claim, against defendant to recover back the sum of \$2245, which they had paid to defendant, in installments from July 19, 1929, to December 1, 1931, on their written agreement, dated June 1, 1929, to purchase certain improved premises in Mount Prospect, Cook county, Illinois, on which there was a first mortgage of \$7,000 and which mortgage they had assumed and agreed to pay. Defendant filed an affidavit of merits in which it set forth various defenses. The agreement was made with the Midland Finance & Realty Co., a corporation, duly organized in Illinois "as an 'agency and loan corporation' for the purpose of acting as agents and brokers for others in the purchase, sale, renting and management of real estate," etc. By the agreement the Midland Co. covenanted that if plaintiffs, as purchasers, should "make the payments and perform the covenants" thereafter mentioned on their part to be made and performed, it would "cause to be conveyed to them * * by a good and sufficient conveyance" the premises. The agreement was signed on behalf of the Midland Co. by Ralph W. Durham, its president, and at that time he was the owner and title

51

1941 [unclear]

42

1944

200.415.2

THE UNIVERSITY OF CHICAGO PRESS

7. The following are the names of the persons who have been appointed to the various positions in the organization:

To the full extent of my power, I have endeavored to divest

[illegible][illegible]

all available information on the subject of the

1. The first part of the report is a general statement of the purpose of the study.

THE UNIVERSITY OF CHICAGO LIBRARY

The following table shows the results of the regression analysis:

Health and safety are essential for the well-being of the community.

RECEIVED BY THE DIRECTOR, FBI, 11/11/68

THE UNIVERSITY OF CHICAGO PRESS

Journal of Interpersonal Violence 26(10)

... ..

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 05-10-2010 BY 60322

— *Journal of the American Medical Association*, 1997

Q. ...anytime it is shown before it is admitted for sale or is shown

[illegible]

Downloaded by [University of California, San Diego] on 04/02/16. See www.palgrave-journals.com/joc for article and full journal content.

10/10/2011 10:10:10 AM

holder of record of the premises. On July 8, 1929, an instrument in writing, signed by the Midland Co., and by said Durham and another individually, was executed and delivered whereby they assigned to defendant corporation all their right, title and interest in and to the agreement of June 1, 1929, and all money due or to become due thereon, of which assignment plaintiffs had notice. Thereafter plaintiffs were given possession of the premises and made said installment payments on the agreement to defendant. They ceased making payments, however, after December 1, 1931, although they continued to live on the premises until October 20, 1932. They did not surrender their possession but were evicted by the sheriff, acting under orders of a court in foreclosure proceedings under the first mortgage, which proceedings were occasioned by their failure to continue to make their promised payments. For the period from December 1, 1931, to October 20, 1932, they neither made any payments under the agreement nor for rent for the use and occupation of the premises. Of the total amount of \$2245, paid by plaintiffs to defendant under the agreement and assignment, defendant properly applied \$1015 in paying interest due to said first mortgagee; paid \$455.29 for accrued interest under the agreement; and \$774.71 for accrued principal under the agreement.

The cause was tried before the court without a jury during April, 1933. The theory of plaintiffs was in substance that the agreement of June 1, 1929, was ultra vires the Midland Co. to make, and on that account void, and that, hence, all moneys paid by plaintiffs could be recovered back in an action for money had and received. Defendant's theories of defense were in substance (1) that the agreement was not ultra vires the Midland Co., or on that account void, in view of its particular charter; (2) that plaintiffs had knowledge that Ralph E. Durham was the owner of the premises and that the Midland Co., in making the agreement, was merely acting as the agent of Durham in

promoting the conveyance; (3) that plaintiffs, having taken possession of the premises under the agreement and held it until evicted as stated, are in reality attempting in this action to have the agreement rescinded, without having previously restored the possession taken, and, therefore, should be estopped from recovering any moneys paid under the agreement; and (4) that, in any event, plaintiffs should be charged with the fair rental value for the time they actually occupied the premises. On the trial each of the parties introduced considerable oral and written evidence. On April 20, 1933, the court found the issues against defendant, assessed plaintiffs' damages at the sum of \$774.71, and, after overruling the motions of each of the parties for a new trial, entered judgment against defendant on the finding in said sum. Each party prayed and was allowed a separate appeal to this court. Defendant alone perfected its appeal and plaintiffs have here assigned cross-errors, claiming various errors of the court in rulings on evidence and in not entering a finding and judgment against defendant for the full amount of their claim (\$2245.)

The bill of exceptions discloses that the trial judge, immediately prior to the entry of the finding and judgment, made the following statement:

"I have come to this conclusion in this case: That the Pelham Company (defendant) acted as agent for plaintiffs in turning over the money on the first mortgage, and, therefore, plaintiffs are estopped from claiming that money (\$1015). The \$774.71 before that time, I will hold in favor of plaintiffs. The finding will be for \$774.71, and that Pelham Company acted as the agent to turn over the money on the first mortgage. Motions for new trial overruled."

After reviewing the evidence, including several stipulations of the parties made during the trial, and considering the respective arguments of opposing counsel, we are of the opinion that the judgment should be reversed and the cause remanded for another trial, at which additional evidence may be presented. And because a new trial may be had we refrain from any further detailed discussion of the evidence

provision in paragraph (b) that plaintiff, having been informed of the proposed settlement and that it would result in a settlement of the case, was in a position to make the settlement. The court found that the settlement was made in good faith and that the settlement was in the best interests of the parties. The court also found that the settlement was not the result of any fraud or misrepresentation. The court therefore affirmed the settlement.

The bill of exceptions submitted was the first bill of exceptions filed in the case. The bill of exceptions was filed on the day of the trial. The bill of exceptions was filed in accordance with the rules of the court.

I have read the bill of exceptions and find that it contains no errors. The bill of exceptions is correct and complete. The bill of exceptions is filed in accordance with the rules of the court. The bill of exceptions is filed on the day of the trial.

The court has reviewed the bill of exceptions and finds that it contains no errors. The bill of exceptions is correct and complete. The bill of exceptions is filed in accordance with the rules of the court. The bill of exceptions is filed on the day of the trial.


or of the application thereto of the opposing theories of law of the parties, as above stated. While it may be that the judge was justified in his statement that plaintiffs are estopped from recovering back the \$1015 paid by them to defendant for application on the first mortgage, which they had assumed and agreed to pay, it is difficult for us to perceive why the court entered the particular finding and judgment that it did, especially in view of the fact that plaintiffs, after they ceased making payments on the agreement (December 1, 1931) until they were evicted in the manner stated (October 20, 1932), did not pay anything for the use and occupation of the premises, and in view of the further fact that when plaintiffs commenced the present action (February 13, 1932) they had not surrendered possession, and, indeed, continued to retain possession for about nine months thereafter until so evicted. And there was some evidence introduced by defendant as to the rental value of the premises.

The judgment of the municipal court is reversed and the cause remanded.

REVERSED AND REMANDED

Scanlan and Sullivan, JJ., concur.

37185

RUDY WIEDOEF, 
Defendant in Error,

v.

FRANK HOLTOM & CO.,
a corporation,
Plaintiff in Error.


ERROR TO SUPERIOR

COURT OF COOK COUNTY.

277 I.A. 609²

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Complainant's original bill for an accounting was filed on December 10, 1930. After defendant's demurrer thereto had been sustained, complainant filed an amended bill on February 13, 1931, based upon a written agreement of the parties of November 7, 1927, set forth as an exhibit to the bill. Thereafter defendant filed its answer, in which, after denying some of the material allegations of the bill, it set forth as an exhibit a prior agreement of the parties of April 20, 1927. Upon a reference being had to a master (Sydney S. Pollack) to take proofs and report his conclusions, hearings were had from time to time. The master's report was exhibited in August, 1932, in which, after making findings, he concluded that "the contract between the parties" (evidently referring to the agreement of November 7, 1927) "is valid and enforceable, and that complainant is entitled to an accounting." Defendant filed objections to the report but all of them were overruled, and during December, 1932, the report was filed, and the court ordered that the objections stand as exceptions. During February, 1933, the court entered an order, on complainant's motion, rereferring the cause to a master for a "more specific" report as to (1) Whether the contracts sued upon were breached, and if so, when the breach occurred, and

1945

UNITED STATES

DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

UNITED STATES DEPARTMENT OF JUSTICE

277 I.A. 609

UNITED STATES DEPARTMENT OF JUSTICE

DEPARTMENT OF JUSTICE

UNITED STATES DEPARTMENT OF JUSTICE

Complaints of a criminal offense for an accounting was filed

on December 10, 1930. After defendant's answer thereto was filed

on January 10, 1931, plaintiff filed an amended bill on February 10, 1931,

based upon a written agreement of the parties of November 7, 1929,

and to the effect that the bill. Defendant answered that

the answer, in which, after denying some of the material allegations

of the bill, is not taken as an admission or prior agreement of the

parties of April 20, 1930. Upon a reference being had to a master

(Henry A. Boland) to take depositions and report the same,

depositions were had from time to time. The master's report was

submitted on August 10, 1931, in which, after setting forth the

conclusions that "the contract between the parties" plaintiff's testimony

to the agreement of November 7, 1929, "is valid and enforceable" and

that plaintiff is entitled to an accounting. Defendant filed

objections to the report of all of them were overruled, and finding

thereon, 1930, the report was filed, and the court ordered that the

objections stand as overruled. (Finding of fact, 1930, and order

entered on order, on plaintiff's motion, notwithstanding the court in

a master for a "good specific" report as to (1) whether the defendant

used upon the business, and if not, what the sum of money, and

whether same is in effect; (2) the dates to be included in any accounting to be taken; (3) of what items such accounting shall be taken; (4) whether the accounting shall cover saxophones other than those marked "Rudy Wiedoeft Model," and what such other ones shall be included; and (5) to modify the report in such manner as the master may deem advisable. During March, 1933, the master exhibited a "supplemental" report in which he found (1) that "the contracts herein sued upon were not breached;" (2) that the dates to be included in any accounting "are from the date of said agreement (November 7, 1927) to December 1, 1930, when defendant discontinued the manufacture and sale of the 'Rudy Wiedoeft Model,'" and (3) that the items to be included in the accounting "shall be all instruments sold by defendant and known as the 'Rudy Wiedoeft Model,'" and that "no saxophones other than those marked 'Rudy Wiedoeft Model' should be included." To the supplemental report both parties filed objections. Those of complainant were to the effect that the master should have found (1) that "the accounting should be taken from the date of said agreement (November 7, 1927) to the date of the taking of said account;" and (2) that "all Rudy Wiedoeft Model saxophones should be accounted for, together with saxophones sold by defendant, regardless of under what name they were sold, which were similar to said Rudy Wiedoeft model;" and that there should be further included in the accounting (a) "all saxophones sold by defendant after the date (December 1, 1930) when it discontinued the sale of Rudy Wiedoeft Model Saxophones," and (b) "compensation at the rate of \$500 a week, for six weeks during each year since the making of said agreement until the taking of said accounting, as and for the services of complainant contracted for in said agreement." The objections of defendant to the supplemental report were to the effect that the master should have found (1) that "said contracts

sued upon were breached by complainant prior to the filing of his bill;" and (2) that complainant "was not entitled to any accounting for any period." All objections were overruled by the master and, after the supplemental report had been filed, the objections were ordered to stand as exceptions.

Thereafter there was a hearing before the chancellor upon the amended bill, answer and replication; the evidence heard before the master and contained in his original report; both reports of the master; and the several exceptions thereto. And on July 18, 1933, the court entered the decree in question, in which, after making findings hereinafter mentioned, it was ordered and adjudged as follows:

(1) "That defendant account to complainant for all saxophones sold by it from and after November 7, 1927, at the rate of Five (\$5) Dollars for each of said saxophones sold by defendant until such time as the saxophones known under the name of 'Rudy Wiedoeft Model Saxophone' were discontinued, in the year 1930, (i.e., December 1, 1930) and that it further account to complainant for all saxophones sold by it after the date of such discontinuance, at the rate of \$5 for each and every saxophone sold under the name of 'Revelation Model.'"

(2) "That defendant account to complainant for such amount as may be due complainant, if any, under the employment feature of said contract."

(3) "That this matter be referred to Earl C. Hales, Master in Chancery, to take the account herein ordered and to report the same back to this Court together with his conclusions, and for better discovery of the matters aforesaid defendant is hereby ordered to produce before said Master, and leave with him until otherwise directed, all books, papers and records in its custody or under its control relating thereto, and said Master will cause to come before him all such witnesses whose testimony he may deem necessary and examine them upon oath and interrogatories touching said account."

(4) "That defendant pay to complainant whatever amount shall be found by said accounting by defendant to be due to complainant, if any, and that execution issue therefor."

(5) "That the contract between the parties is in full force and effect and that complainant is entitled to recover from defendant such sums as may become due under the terms of said contract from time to time until the expiration of said agreement, (i.e., November 7, 1937) the Court, therefore, reserving jurisdiction of this cause for the adjudication of all rights of the parties under said contract."

The court's findings in the decree are as follows:

(a) "That complainant has for many years heretofore, been a musician of considerable training and experience and has engaged and become proficient in the playing of the saxophone and that he is engaged in giving many public exhibitions on said instrument and has recorded his playing on discs and records and has obtained great popularity by playing over the radio; that his playing has been heard by millions of persons and he has created a reputation by his performances and a great demand for his services in such regard.

(b) That defendant, Frank Helton and Co., is a corporation organized and existing under and by virtue of the laws of the State of Illinois with its principal place of business at Elkhorn, Wisconsin, and is engaged in the manufacture and sale of musical instruments, including the saxophone.

(c) That on the 7th day of November, 1927, complainant and defendant entered into an agreement in writing, a true copy of which is attached to the bill of complaint herein, marked 'Exhibit A'.

(d) That in accordance with the terms and conditions of said agreement complainant devised certain changes in the saxophone then manufactured by defendant; that as result of complainant's suggestions the size and position of the tone holes were changed and the low register key was also changed; that as a result of such changes the instrument known as the 'Rudy Wiedsoft Model Saxophone' was manufactured and sold by defendant; that complainant did everything in his power to popularize said instrument over the radio and by other methods of advertising and that he was instrumental in having Paul Whiteman's band use said saxophone, which added materially in increasing the popularity of the instrument.

(e) That complainant, in accordance with the stipulations of said contract, used said model saxophone to the exclusion of all others and still continues so to do.

(f) That under the terms of said agreement defendant agreed to engage complainant for a period of not less than six weeks, nor more than ten weeks, in each year during the term of the agreement, to advertise and sell said model saxophone, and for such engagements agreed to pay complainant the sum of \$500 per week, together with any and all travelling expenses, yet defendant engaged complainant only for six weeks during the first year of said contract and that for subsequent years he has received no engagements of any kind or any remuneration therefor; that complainant was at all times ready, willing and able to render his services in accordance with said agreement and has tendered himself so to do by asking for such engagements in person, by mail and through his attorneys, and that said defendant has refused to give him said engagements or to pay him therefor and that complainant is still ready, willing and able to carry out all of said provisions of said agreement and has offered so to do.

(g) That complainant has, in accordance with said agreement, prepared for defendant a booklet on the saxophone containing his instructions for playing the same, a true copy of which, marked 'Exhibit B,' is attached to the bill of complaint herein, which booklet defendant has caused to be printed and distributed in large numbers, resulting in the sale by defendant of a great number of saxophones.

(h) That complainant has substantially performed all of the provisions of the aforesaid agreement by him required to be performed.

(i) That while defendant had made several payments to complainant from the date of the contract until December 31, 1929, it has never tendered him sworn statements of account as provided for in said agreement, and that it has, since said last mentioned date, refused to pay him any moneys due under said contract and refused to account to him therefor and has refused to furnish him with verified or sworn statements of the account in direct violation of said agreement.

(j) That defendant has sought to avoid liability under said contract and avoid the making of payments thereunder by claiming that the contract is contrary to public policy and void and that the conduct of the parties in carrying out the contract was illegal and intended to mislead the public. The Court finds that the contract is legal and enforceable; that no deception in the performance of same was practiced by the complainant; that he participated in designing the saxophone and helped materially in its sale.

(k) That the 'Rudy Wiedoeft Model Saxophone' was manufactured and sold by defendant until the year 1930, (i.e., December 1, 1930) when complainant's name was discontinued on the instrument but that defendant continued to manufacture and sell practically the same model thereafter under the name 'Revelation Model,' and that the discontinuance is a subterfuge in an attempt by defendant to defeat complainant's right to recover compensation as provided in said contract.

(l) That the exceptions to the Master's original report should be overruled and said report sustained, and that the exceptions of defendant to the Master's supplemental report should be overruled, and the exceptions of complainant to the Master's supplemental report should be sustained, and said Master's reports should be approved, except as to such matters covered by the exceptions herein sustained and as to such matters the report is hereby modified in accord with said sustained exceptions and accordingly approved.

(m) That the Master's fees should be fixed at the sum of \$551.75; and that complainant, having already paid the same, is entitled to execution therefor against defendant, and execution is hereby ordered.

(n) That all the equities of the cause are with complainant and that complainant is entitled to an accounting from defendant and to the relief prayed for in the bill of complaint herein."

In the written agreement of November 7, 1927, signed by defendant by its president (Frank Holton) and its treasurer (W. J. Charlton) and by complainant, defendant is designated as the "Manufacturer," and complainant (residing at Flushing, Long Island, New York) as the "Artist." In the preamble it is stated that "the Artist is a prominent player of the saxophone and for a number of

(a) The Commission of the European Communities is to be established by the Council of Ministers of the European Community.

(b) The Commission shall be composed of nine members, five of whom shall be designated by the Council of Ministers of the European Community, and four of whom shall be designated by the governments of the Member States.

(c) The Commission shall be headed by a President, who shall be elected by the Council of Ministers of the European Community for a term of five years.

(d) The Commission shall be assisted by a Secretary-General, who shall be appointed by the Council of Ministers of the European Community.

(e) The Commission shall be assisted by a number of departments, each headed by a Director-General, who shall be appointed by the Council of Ministers of the European Community.

(f) The Commission shall be assisted by a number of departments, each headed by a Director-General, who shall be appointed by the Council of Ministers of the European Community.

(g) The Commission shall be assisted by a number of departments, each headed by a Director-General, who shall be appointed by the Council of Ministers of the European Community.

(h) The Commission shall be assisted by a number of departments, each headed by a Director-General, who shall be appointed by the Council of Ministers of the European Community.

(i) The Commission shall be assisted by a number of departments, each headed by a Director-General, who shall be appointed by the Council of Ministers of the European Community.

(j) The Commission shall be assisted by a number of departments, each headed by a Director-General, who shall be appointed by the Council of Ministers of the European Community.

years past has been engaged in giving public exhibitions and will continue to be so engaged;" that "the Manufacturer is desirous of increasing its sales of the saxophone with the aid of the Artist;" and that "the Artist is willing to extend such aid to the Manufacturer upon certain terms and conditions." And it is agreed in part as follows:

1. The Artist agrees to "make certain suggestions" to the Manufacturer "with regard to the improvement and construction of a saxophone," and, at the request and expense of the Manufacturer, to apply for patents on any such suggestions as shall be patentable and, if patents be obtained, to assign them to the Manufacturer.

2. The Manufacturer agrees "to employ its utmost skill to construct as soon as possible a saxophone satisfactory to the Artist, employing such practical suggestions and improvements as he may make, which saxophone is to be known as, and have engraved thereon, the 'Rudy Wiedoeft Model Saxophone,' made by Frank Holton & Co., Elkhorn, Wisconsin."

3. The Artist agrees to "play said model instrument to the exclusion of all other makes of saxophones, at any and all of his public appearances during the term of this contract." (10 years.)

4. The Manufacturer agrees "to pay to the Artist a royalty of \$5 for each and every 'Rudy Wiedoeft Model Saxophone' sold by the Manufacturer." (Here follow provisions as to times of making semi-annual payments thereon, etc.) It is distinctly understood and agreed that such royalty "shall be payable as long as the Manufacturer shall continue to sell" said Model Saxophone.

5. The Manufacturer agrees "to engage the artist for a period of not less than 6 weeks, nor more than 10 weeks, in each year during the term hereof, to demonstrate, advertise and sell said Model Saxophone, in such cities and towns of the United States and Canada as the Manufacturer may designate." The demonstrations, advertising and selling shall be under the direction of the Manufacturer, "and shall consist of at least three daily demonstrations of not less than one hour each." For such services the Manufacturer "agrees to pay to the Artist, the sum of \$500 per week, together with any and all transportation expenses."

6. The Artist agrees to accept such employment, upon the terms mentioned in paragraph 5, "and to use his best efforts in connection therewith."

7. It is mutually agreed that said weeks of employment "shall be arranged by mutual consent;" that "one of said weeks shall be in February of each year," one in "March of each year, and four weeks in September, October or November of each year;" and that the actual dates are to be agreed upon at least 30 days prior to such dates.

8. The Artist further agrees "to prepare for the manufacturer a booklet on the Saxophone, containing his instructions for

playing the same, which booklet is to be printed and distributed at the expense of the Manufacturer." The Artist further agrees to distribute such booklets whenever possible, "to offer to the Manufacturer any constructive suggestions which he may have for the improvement of the saxophone, to promptly forward or refer to the Manufacturer any letters or communications in connection with saxophones and their use, and generally to co-operate with the Manufacturer in the sale of said Model Saxophone in every way possible."

The Manufacturer on its part further agrees, "to use its best efforts to further the sale of the 'Rudy Wiedoeft Model Saxophone,' and to offer said saxophone for sale before offering any other model saxophone manufactured or sold by the Manufacturer;" and further agrees that "it will not, during the term of this agreement, manufacture, advertise or sell any model saxophone, bearing the name of any other saxophone artist."

9. The Artist on his part further agrees that he will not serve any other musical instrument manufacturer in any capacity conflicting with the terms and conditions hereof, during the term of this agreement.

10. This contract "shall continue for a period of ten years from the date hereof."

Although no mention is made in said agreement of the making of the prior agreement of April 20, 1927, containing similar provisions, it appears from the evidence that after partial performance of the prior agreement by both parties, and after negotiations concerning the making of a new agreement to take its place, the agreement of November 7, 1927, was formally executed and afterward both parties did acts of performance thereunder. The prior agreement contained several provisions less favorable to complainant, which were omitted in the later agreement. One of these omitted provisions is: "If second party (Wiedoeft) becomes permanently incapacitated so that he no longer engages in public appearances, or if he ceases to have substantial value, first party (Molton & Co.) may cancel the contract."

During the hearings before the master, complainant testified at considerable length and he called as his witness Harry J. Charlton, manager of defendant and with whom complainant dealt in person and by correspondence concerning acts of performance, etc., under the contract of November 7, 1927. Nine witnesses testified for defendant. Both parties introduced in evidence many writings, including the two contracts mentioned, the "booklet," certain pamphlets, invoices and

advertising matter, and many letters passing between the parties. During the cross-examination of one of defendant's witnesses the following stipulation was made.

"That the so-called present 'Revelation Model,' now manufactured and sold by Frank Holton & Co., is the same as the 'Rudy Wiedoeft R. Model,' which was fashioned after the French instrument, so far as the body, the bow and the bell are concerned. The tonal holes are also the same and the spacing of the tonal holes, * *. The result is that the tone, tune and intonation of the present 'Revelation Model' is the same as that produced by the so-called 'Rudy Wiedoeft Model.'"

Among the findings of the Master, as contained in his original report, are the following in substance:

That complainant's name "was featured" on the "Rudy Wiedoeft Model Saxophone" until December, 1930, when defendant discontinued the use of complainant's name on said instrument, but defendant "continued selling" the instrument without complainant's name thereon; and that the instrument "was subsequently called the 'Holton New Revelation Saxophone' and was almost identical with the model known as the 'Wiedoeft Model.'"

That it is contended on defendant's behalf that "complainant did not continue his public appearances and strive to merit popular favor, did not give demonstrations each week during his tours when arrangements could be made by defendant or its agents, and that complainant discontinued such tours;" that "complainant did not write a booklet on the Saxophone, containing instructions for playing same as agreed by him, but supplied material for the booklet purported to have been written by him, and that one-third of the booklet had been published and copyrighted by H. Selmer & Co. in 1922;" that "complainant failed to make any suggestions to defendant in regard to the improvement and construction of the saxophone;" and that "the low register key, which complainant claims was suggested by him, was already then and there on the saxophone."

is

That it ^{is} further contended on defendant's behalf that "complainant comes into court with unclean hands;" that "the contract was illegal in that he advertised and helped to distribute over 125,000 of the booklets which contained the false statement that he 'had no mercenary motive in giving away the booklets,' etc." and the statement that he had "devised radical improvements and made changes in the saxophone," whereas the facts are that the changes suggested by him resulted in such a poor instrument that he said on one occasion that "he could not demonstrate on it," that he "did not devise or design anything on the instrument," that his "whole purpose and intention was to deceive and mislead the public into believing that said saxophone was a model designed by him in collaboration with Holton & Co." and that "he did considerable false and deceptive advertising in addition to that contained in the booklet."

That the master finds, however, that "complainant did devise and suggest certain changes in the instrument then manufactured by defendant;" that "as the result of complainant's suggestions the size and position of tone holes were changed and the low register key also was changed, and that as the result of such changes an instrument,

...the ... of the ...
...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...
...the ... of the ...

...the ... of the ...

...the ... of the ...

...the ... of the ...
...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...
...the ... of the ...

is

...the ... of the ...
...the ... of the ...
...the ... of the ...

...the ... of the ...
...the ... of the ...
...the ... of the ...

known as 'Rudy Wiedoeft Model Saxophone' was manufactured and sold by defendant;" that complainant did everything in his power to popularize said instrument over the radio and by other methods of advertising; that said booklet, containing complainant's instruction for playing on the saxophone, "was not plagiarized by complainant, as defendant claims;" and that complainant "substantially performed the provisions of the agreement in question."

That "defendant relies principally on its contention that the contract itself (i.e., the agreement of November 7, 1927) was contrary to public policy and therefore void, and that the advertising itself was untrue and intended to mislead the public." That the master finds, however, that "no deception was practiced by complainant;" that he participated in the designing of said saxophone and "helped materially in its sale;" that he "was employed to help in such sales and to appear at performances, which he did;" that the advertising "was all ordered by defendant;" and that "while some extravagant statements were included in such advertising, they were sanctioned and approved by defendant."

That the "Rudy Wiedoeft Model Saxophone" was manufactured and sold by defendant until 1930, when complainant's name was discontinued on the instrument, but "defendant continued to manufacture and sell practically the same model thereafter."

The main contention here urged by defendant's counsel as a ground for a reversal of the decree is that "the performance of Wiedoeft's contract with Holton & Co. involved a fraud and imposition upon the public, and, therefore, neither party to the contract will be afforded relief in equity to enforce the terms of such an agreement." The contention is argued by counsel at considerable length and many adjudicated cases in Illinois and other jurisdictions are cited in support of the contention. After reviewing those cases we are of the opinion that the decisions and holdings therein were based upon facts materially different from those in the present case and that said decisions are not here applicable. In the present case both the master and chancellor decided counsels' contention adversely to them, in view of the provisions of the agreement of November 7, 1927, and all the evidence, and we think that their decisions and the court's decree are amply sustained by the evidence.

Another contention urged by counsel is that "the record discloses that Wiedoeft failed to perform all of the terms and conditions of the contracts on his part to be performed, and, hence, was not entitled to a decree for an accounting." In arguing this

52 years old at publication of the "American" paper. He was born in the town of ... and was educated in the ... He was a member of the ... and was a ...

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This is a result of the fact that urban areas offer more opportunities for employment and education than rural areas do. The process of urbanization has led to the growth of large cities and the decline of small towns and villages. This has had a major impact on the way of life in the United States. The majority of the population now lives in cities, and this has led to a number of changes in the way of life. For example, the majority of the population now lives in multi-story apartment buildings or houses, and this has led to a change in the way of life. The majority of the population now lives in cities, and this has led to a number of changes in the way of life. For example, the majority of the population now lives in multi-story apartment buildings or houses, and this has led to a change in the way of life.

1. The first of these is the fact that the
- It is not clear whether the
- The second of these is the fact that the
- The third of these is the fact that the

[illegible]

contention counsel take the position that the provisions of both contracts (i.e., those of the contract of April 20, 1927, as well as those of the substituted contract of November 7, 1927) should be considered and construed together. We cannot agree to this, as it clearly appears from the evidence and the provisions of the later contract that it was the intention of the parties that said later contract should supersede the earlier one. As said in Stow v. Russell, 36 Ill. 18, 30: "If it had been intended to revive and extend the old contract, it is natural to suppose that some reference to it, or some intimation to that effect, would be found in the contract actually made. None is found in it." And under all the evidence we are of the opinion that Wiedoeft, as found by both master and the chancellor on conflicting evidence, substantially performed all of the provisions of the agreement of November 7, 1927, by him required to be performed, so far as defendant permitted him so to do, and that there is no merit in counsels' instant contention.

A third contention urged by counsel is that "the decree goes beyond the terms of the contract (of November 7, 1927) and requires performance by Helton & Co. in excess of its requirements." In arguing this contention counsel refer to a part of paragraph 1 of the "ordering" portion of the decree (above set forth) wherein it is adjudged that defendant "further account to complainant for all saxophones sold by it after the date of such discontinuance (December 1, 1930), at the rate of \$5 for each and every saxophone sold under the name of 'Revelation Model.'" We think that there is some slight merit in the contention. The evidence discloses that before either of the contracts was executed, and before Wiedoeft had any business relations with defendant, defendant manufactured and sold a saxophone known as "Revelation Model" and continued to sell some saxophones of that model upon request of purchasers even after the "Rudy Wiedoeft

Model" began to be manufactured and sold; and that this old "Revelation Model" did not embody any of the changes as made in the "Rudy Wiedoeft Model," whilst the new or present "Revelation Model" do embody said changes. The language of the portion of the decree mentioned makes no distinction between the old and the new "Revelation Models." It merely says "under the name 'Revelation Model.'" This language possibly renders said portion of the decree uncertain. It is, however, no ground for a reversal of the entire decree, as urged by defendant's counsel. The language can be modified, and we think that it should be, by the addition of the following words: "which substantially embodies any of the changes made by Wiedoeft and contained in the Rudy Wiedoeft Model."

Our conclusion is that the decree of superior court of July 18, 1933, should be affirmed in its entirety, except that to said paragraph 1 of the "ordering" portion of the decree, as written, there be added the words "which substantially embodies any of the changes made by Wiedoeft and contained in the 'Rudy Wiedoeft Model.'"

DECREE AFFIRMED AS MODIFIED.

Seanlan and Sullivan, JJ., concur.

37206

VIRGINIA M. KERR, Administratrix
of the Estate of Joseph R. Kerr,
deceased,

Plaintiff in Error,

v.

FRANK J. McKEE and NATIONAL
SHIPPERS & MOVERS, Inc., a cor-
poration,
Defendants in Error.

ERROR TO SUPERIOR

COURT, COOK COUNTY.

277 I.A. 609³

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error, sued out of this court on November 15, 1933, Virginia M. Kerr, as administratrix, etc., seeks to reverse an order or decree of the superior court, entered during the lifetime of Joseph R. Kerr on March 15, 1933, as follows:

"Upon motion of defendants' solicitors, after the filing by them of written suggestions for the assessment of damages upon the dissolution of an injunction issued in the cause, and complainant (Joseph R. Kerr) being represented by counsel, the court "having read the verified petition of defendants filed herein" and having heard arguments of counsel, "finds that the sum of \$250 is a reasonable sum for services rendered by defendants' solicitors in dissolving said injunction," and

"It is therefore ordered and decreed that the sum of \$250 be and the same is hereby assessed against complainant in favor of the defendants as damages suffered by them as a result of the wrongful issuance of an injunction."

And it is further ordered that execution issue against Joseph R. Kerr in favor of said defendants in said sum of \$250, forthwith.

In the present praecipe record we fail to find any

"verified petition" as mentioned in said order. During the term at which the order was entered, viz., on March 31, 1933, the court allowed complainant's motion for an appeal from the order, conditioned upon his filing a bond with surety within 20 days, and also allowed him 20 days within which to present a certificate of evidence.

Complainant, however, did not perfect his appeal, but on April 20, 1933, (within the 20 days) he obtained an extension of time (20 days) within which to present a certificate of evidence, and the record discloses that on April 26, 1933, he presented such an instrument and the same was duly signed and sealed by the chancellor and filed in the clerk's office on that day. In said instrument, after setting forth the fact of the hearing on March 15, 1933, on defendant's motion for the assessment of damages on the dissolution of said injunction, the chancellor certified in substance that on said hearing, after arguments of counsel the order or decree was entered, -- "no witnesses having been sworn, nor any evidence having been offered or heard, but statements of counsel as to services were made."

The record further discloses in substance that on November 28, 1932, upon a bill previously filed, Joseph R. Kerr obtained a temporary injunction, restraining defendants from removing or disposing of certain goods then in a certain warehouse in Chicago until the further order of court; that the usual injunction bond was filed and approved; that on December 29, 1932, upon motion of defendants for a dissolution of the injunction and after a hearing, the court dissolved the injunction; and that on February 9, 1933, after the term at which the order of dissolution was entered had passed, defendants first presented written suggestions as to damages claimed by them to have been sustained by the wrongful suing out of the injunction. In section 12 of our "Injunctions" Act it is provided as follows: (Cahill's Stat. 1931, Chap. 69, p. 1596):

"In all cases where an injunction is dissolved by any court of chancery in this State, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting in writing the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damaged by such injunction, and may award execution to collect the same: Provided, a failure to so assess

damages shall not operate as a bar to an action upon the injunction bond."

The main contention here urged by counsel for plaintiff in error for a reversal of the order or decree in question is in substance that it does not affirmatively appear either from the order itself or from the certificate of evidence that any evidence on the question of defendants' damages was heard by the chancellor; and that, apparently, the chancellor arbitrarily fixed the amount of \$250 as damages without evidence or upon the mere statements of counsel. We are of the opinion that there is substantial merit in the contention. In Delahanty v. Warner, 75 Ill. 185, 186, it is decided in substance that where the record shows the assessment of damages upon the dissolution of an injunction, but does not show the evidence upon which the assessment is made, the order should be reversed. In Forth v. Town of Kenia, 54 Ill. 210, 212, a case involving the assessment of damages on the dissolution of an injunction, it is said: "We are not aware of any rule of law or equity requiring this court to presume that the circuit court heard evidence on rendering a decree. The rule has often been stated by this court that the facts on which a decree in equity is based, must appear somewhere in the record." In Hamilton v. Stewart, 59 Ill. 330, 335, another case involving the assessment of damages on the dissolution of an injunction, it is said: "No evidence is preserved in the record on the question of damages, and consequently there is nothing to sustain the decree in making the assessment, * *. The evidence upon such an issue should be preserved, the same as upon other questions involved in the case, on which relief is sought, or the decree cannot be supported." (See, also, Allbright v. Smith, 68 Ill. 181, 183-4; Spring v. Collector of Olney, 78 id. 101, 107.)

On December 5, 1933, after plaintiff in error had filed her printed brief and argument in this court but before defendants in

...shall not operate as a bar to an action upon the instrument
herein.

The said condition have been by and for the said

in order for a recovery of the debt or interest in the

sums due and owing to the said party of the first part in the

sums of ... of ... and ... in the

sums of ... and ... by the said party of the

first part, respectively, the said party of the first part

as ... and ... of the said party of the

first part, the said party of the first part is authorized to

also, in ... of ... to ... in

sums of ... of the said party of the first part

the ... of ... and ... in the

sums of ... and ... in the

of ... of ... in the

not ... of ... in the

that the ... of ... in the

and ... of ... in the

sums of ... and ... in the

... of ... in the

sums of ... and ... in the

... of ... in the

and ... of ... in the

sums of ... and ... in the

the ... of ... in the

is ... of ... in the

v. ... of ... in the

...

...

...

error had filed their brief, defendants in error filed a motion, accompanied by written suggestions, that the certificate of evidence be expunged from the record. The motion will now be denied. In our opinion it is without merit.

For the reasons indicated the order of the superior court of March 15, 1933, in question, should be and is reversed.

REVERSED.

Seanlan and Sullivan, JJ., concur.

which has been found to be the most effective in the treatment of the disease. It is a very simple and easy to use, and it is very effective in the treatment of the disease. It is a very simple and easy to use, and it is very effective in the treatment of the disease.

For the treatment of the disease, it is very effective in the treatment of the disease. It is a very simple and easy to use, and it is very effective in the treatment of the disease.

12

12

37245

FRED L. FUHR,
Complainant and Appellant,

v.

RICHARD A. KNOWLES, BEMA M. KNOWLES,
his wife, HENRY KNOWLES, EVA KNOWLES,
his wife, and AUGUST F. POEHLMANN,
Trustee,
Defendants.

RICHARD A. KNOWLES et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

277 I.A. 610¹

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In an action, commenced December 19, 1930, to foreclose a second trust deed on certain improved premises in Cook county, the court, on September 22, 1933, after a hearing upon exceptions to the master's report, sustained the exceptions, refused to follow the master's recommendations, and entered a decree dismissing complainant's bill for want of equity. The present appeal followed.

After separate answers had been filed by all defendants (except August F. Poehlmann as trustee, who was defaulted) the cause was referred to the master to take proofs, etc. On the hearings before him considerable oral and documentary evidence was introduced. Complainant testified in his own behalf and he called as his witnesses Richard A. and Henry Knowles (defendants), and Ernest Kruse and Harry J. Mueller (respectively cashier and a former employee of the Morton Grove Trust & Savings Bank, located at Morton Grove, Illinois.) For defendants, Richard A. and Henry Knowles each gave further testimony

177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

WILLIAM A. THORNTON, JR.
177

and John V. Mahan, their solicitor and counsel in this court, also testified for them. In the master's report, filed November 10, 1932, he made the following findings in substance:

That on December 28, 1926, Henry Knowles and Eva Knowles, his wife, being indebted in the sum of \$2500, executed, indorsed and delivered their principal note of that date, whereby they promised to pay to the order of themselves said sum as follows: \$20 on January 28, 1927, and \$20 on the 28th day of each and every month beginning on the 28th day of February, 1927, for 124 months succeeding, with interest at 6% per annum, payable monthly, "which said note is in evidence herein as Complainant's Exhibit 2."

(On the face of the note, and immediately above the signatures of the makers, is the statement that "the payment of this note is secured by trust deed, bearing even date herewith to August F. Pehlmann, as trustee, on real estate in the County of Cook and State of Illinois." On the back of the note are endorsed various payments of interest and principal, -- the last payment being dated "Jan. 27, 1930.")

That to secure the payment of the principal and interest of the note, the makers on December 28, 1926, executed and delivered their trust deed, whereby they conveyed and warranted to August F. Pehlmann, as trustee, the premises in question (describing them), in trust, however, for the purpose of securing the payment of the indebtedness; that in the trust deed it was provided that in the event of a breach of any of its covenants, or in case of default in the payment of any of the interest installments, then the whole of said indebtedness should at the option of the legal holder of the note immediately become due and payable, etc.; that it was further provided in the trust deed that upon the filing of any bill to foreclose, the court might appoint a receiver, etc., and that upon the failure of the grantors to pay taxes or special assessments, or to keep the building upon the premises in good repair, or to pay the insurance, the then holder of the note might pay the same, and all moneys so paid should become so much additional indebtedness, etc.; and that the trust deed expressly pledged the rents, issues and profits during the period of the equity of redemption, and further provided for the payment of reasonable solicitors' fees, costs, and other expenses.

That the trust deed was filed for record in the recorder's office of Cook county, as document No. 10573961, on January 15, 1930, which deed, with the certificates of acknowledgment and of recordation thereon, is in evidence as Complainant's Exhibit 1, and which deed was given subject to a first mortgage upon the premises for \$4,000.

That complainant, Fred L. Fuhr, is now the legal holder and owner of the note (complainant's Exhibit 2); that there is now due thereon, after allowing credit for all payments made, a balance of \$1780, with interest from January 27, 1930, no part of which has been paid; that complainant paid \$29 to the Chicago Title & Trust Co. for an opinion of title in connection with this foreclosure proceeding, and also has paid \$92.40 for stenographer's charges, for which under the terms of the trust deed ^{he} is entitled to a further lien; that by the terms of the trust deed, in the event of a foreclosure, complainant is entitled to his reasonable solicitor's fees; and that the evidence shows that \$300 is a fair, usual, customary and reasonable charge for

such fees for services rendered by complainant's solicitors. (The master here sets forth an itemized account as to the total amount due to complainant, viz., \$2495, which includes interest (on said sum of \$1780) of \$293.60, the two other items mentioned for expenses and said sum of \$300 for solicitor's fees. This total amount of \$2495 does not include the fees of the master, which in an itemized schedule accompanying his report are stated to be \$257.60, and which, considering the present record, we are of the opinion are reasonable and proper.)

That on November 23, 1929 (i.e., before said second trust deed was recorded) Henry Knowles and wife executed and delivered a warranty deed, conveying the premises to Richard A. Knowles, a brother of Henry Knowles; and that said deed was duly recorded on December 2, 1929, as document No. 10545041;

"That prior to said conveyance to him, Richard A. Knowles was informed that there was a second mortgage on said premises, securing originally the sum of \$2500; that Richard A. Knowles made no inquiry to ascertain who was the legal holder or owner of said note and mortgage, but merely inquired of the bank about the second mortgage as to the amount and whether there was a second mortgage; and that from the above I find that it is unnecessary to determine what answer was given to Richard A. Knowles by any person in the bank, and that Richard A. Knowles would be bound by the information he had received that there was such a mortgage, the same as if said mortgage had been recorded."

That "complainant, Fred L. Fuhr, is entitled to and has a valid second lien upon the premises above described for the amount hereinbefore found due to him, subject to the lien of the first mortgage thereon of \$4,000, together with his costs, including the master's fees upon this reference, to be taxed by the court as a part of the costs of this suit."

That, in conclusion, "I find that all the material allegations of complainant's bill have been proven and are true, and I recommend that a decree be entered in accordance with the foregoing findings."

In complainant's verified bill, filed December 19, 1930, the usual allegations common in foreclosure bills are made and it was alleged that the second trust deed sought to be foreclosed, although executed and delivered by Henry Knowles and wife on December 28, 1926, was not actually filed for record in the recorder's office until January 15, 1930; that prior to its recordation Harry Knowles and wife, on November 23, 1929, conveyed the premises to Richard Knowles, who by virtue of the conveyance then took title to the premises "for the benefit of and on behalf of Henry Knowles," and with "full knowledge" of the existence of said second trust deed; and that Richard A. Knowles is now holding

the title for the purpose of avoiding the payment of the balance of the indebtedness due to complainant on said \$2500 note and thereby defrauding complainant.

In the answer of Richard Knowles to the bill, signed by his solicitor, John F. Mahan, the material allegations are in substance that Richard Knowles holds title to the premises for himself and not for the benefit of Henry Knowles as charged; that complainant is not the bona fide owner and holder of the \$2500 note, but that he "is only a dummy for the purpose of preventing the assertion by this defendant of his legal defenses;" that there was "an unlawful combination and confederacy" between the real owner of said note and the Morton Grove Bank; that the bank "claimed to hold a contract and a contract note, or a contract secured by a note, in lieu of a second mortgage or trust deed;" that on two or more occasions defendant and Henry Knowles "went together to said bank and there made an inquiry in reference to a second mortgage, and on each occasion said bank replied that there was no second mortgage, but only a first mortgage and a contract secured by a contract note;" that defendant and Henry Knowles "made diligent search in the office of the Recorder of Cook County but no second mortgage showed upon the records and indices in that office;" that in the abstract of title of the property, made by the Chicago Title & Trust Co., "there was no record of any second mortgage recorded against the property;" that "this defendant never had at any time any notice, in any shape, form or manner, that there was a second mortgage on the property at the time of the purchase;" and that complainant is not entitled to the relief as prayed in his bill, or any relief, upon the purported document, "not filed for record until almost two months after this defendant had purchased the premises in question, during all of which time said purported trust deed was unlawfully and intentionally withheld from the records and

the title for the purpose of obtaining the payment of the balance of the indebtedness and to compel them to pay the same.

In the event of default on the part of the borrower,

by his failure, John F. Jones, the mortgagee shall be in possession of the premises and shall have the right to sell the same for the purpose of satisfying the debt.

It is further provided that the mortgagee shall have the right to sell the premises for the purpose of satisfying the debt, and that he is only a trustee for the purpose of conveying the same to the borrower.

And it is further provided that the mortgagee shall have the right to sell the premises for the purpose of satisfying the debt, and that he is only a trustee for the purpose of conveying the same to the borrower.

And it is further provided that the mortgagee shall have the right to sell the premises for the purpose of satisfying the debt, and that he is only a trustee for the purpose of conveying the same to the borrower.

And it is further provided that the mortgagee shall have the right to sell the premises for the purpose of satisfying the debt, and that he is only a trustee for the purpose of conveying the same to the borrower.

And it is further provided that the mortgagee shall have the right to sell the premises for the purpose of satisfying the debt, and that he is only a trustee for the purpose of conveying the same to the borrower.

And it is further provided that the mortgagee shall have the right to sell the premises for the purpose of satisfying the debt, and that he is only a trustee for the purpose of conveying the same to the borrower.

And it is further provided that the mortgagee shall have the right to sell the premises for the purpose of satisfying the debt, and that he is only a trustee for the purpose of conveying the same to the borrower.

And it is further provided that the mortgagee shall have the right to sell the premises for the purpose of satisfying the debt, and that he is only a trustee for the purpose of conveying the same to the borrower.

repeatedly denied to exist." The answer of Henry Knowles, also signed by said Mahan as his solicitor, contains similar allegations, and it is further alleged therein in part as follows:

That the property in question was owned continuously in joint tenancy by the defendant and his wife from December 1, 1926, up to and including November 23, 1929, when it was sold and deeded to Richard; that when he (Henry) purchased the property the transaction was handled and consummated by and at said Morton Grove Bank; that all payments of principal, interest, etc., from December 1, 1926, and until the date of the sale of the property to Richard, were made to said Bank for the benefit of the legal holder; that the first mortgage of \$4,000, and all notes in connection with it, and "in addition a certain contract note," were held by said Bank; that "on several occasions," he (Henry) made inquiry at the Bank "as to the kind of document he had signed to secure said contract note," and that on these occasions said "Bank replied that there was no second mortgage, that there had never been any, and that there was only a contract and a contract note;" that "on two or more occasions" he went to the bank in company with Richard and "made further inquiry as to a second mortgage," and that on those occasions the "Bank replied that there was no second mortgage, but only a first mortgage and a contract secured by a contract note;" and that "there was an unlawful and fraudulent agreement between the owners and holders of said second mortgage and said Bank to conceal the mortgage, and to cause great inconvenience and costs to this defendant, should he sell the property secured by said second mortgage, or fail to renew the first mortgage with said Bank."

Complainant testified before the master that he is one of two partners, doing business in Morton Grove, Illinois, as the Morton Grove Lumber Co.; that the partnership has been in existence about 14 years; that he purchased the \$2500 note about the time that Henry Knowles bought the improved premises in question in December, 1926; that he (complainant) is now the owner of the note and said partnership ~~xxx~~ has no interest therein; that the note and the second trust deed were executed by Henry Knowles and wife in part payment of the purchase price of the premises; that all payments of principal and interest on the note were made at the Morton Grove Bank, where it was deposited for collection; that as payments were made they were remitted to him; and that the last payment was made on January 27, 1930, at which time the principal amount of the note had been reduced to \$1780.

Harry J. Mueller, complainant's witness, testified that

in December, 1926, he was employed by the Morton Grove Bank; that the \$2500 note and trust deed in question were executed at the bank in his presence by Henry Knowles and wife; that the note and trust deed were left at the bank for collection; that thereafter either Knowles or his wife came to the bank and made payments on the note; and that in October, 1928, he (the witness) left the employ of the bank and Ernest Kruse succeeded him in his position.

Ernest Kruse, complainant's witness, testified in substance as follows:

During the year 1929, I was the cashier of the Morton Grove Bank. During the month of November, 1929, I had several conversations with Richard Knowles. The first one was at the bank early in November, Henry Knowles also was present, and the talk was in regard to the first mortgage on the property. The next conversation, about five days' later, was with Richard Knowles alone at the bank. I told him the board of directors of the bank wanted the first mortgage paid. Then he wanted to know "if there was any other debt on the property and I told him there was a first mortgage and a second mortgage; and I told him that the Morton Grove Lumber Co. owned the second mortgage." About the middle of November Richard Knowles, in company with his attorney, Mahan, again called on me at the bank and we talked about both the first and second mortgages. I told them that the first mortgage was past due and also that "there was close to \$1700 or \$1800 due on the second mortgage, besides the first which they wanted to renew." Mahan asked me "if I was sure as to the amount that I had said was due on the second mortgage and I said I was." * * At the time early in November that Richard Knowles first called at the bank "he said that he was contemplating buying the property from his brother and that he would like to find out what was the indebtedness on the property; he further said that his brother (Henry) could not hold the property, and that he (Richard) wanted to buy it." * * I had still another conversation with him (Richard) in the latter part of November, 1929, at the bank; he again asked if there was any chance of renewing the first mortgage, and I told him that there was not, that I had taken up the matter a second time with the board of directors of the bank, and they had refused since he did not live in Morton Grove. At the same conversation we again talked about the second mortgage. "He asked me if I knew what the property was worth; I said that I didn't exactly know and couldn't tell him; he said: 'According to the first and second mortgages, I think it is a fair buy.'"

On cross-examination by defendants' solicitor (Mahan) Kruse further testified in part as follows:

"I have known Mr. Fuhr (complainant) about 12 years. His relation to the Morton Grove Bank was that of a depositor. He was not an officer or a director * *. I did not state at the conversation at the bank in November, 1929, when Richard Knowles and you (Mahan) were present, that "there was not any second mortgage on the property." * * "It is not true that at said conversation you (Mahan) called my

attention to the clause in the note (about it being secured by a trust deed) and said that there must be a second mortgage." We didn't discuss that clause at all. * * When Richard Knowles came to the bank the first time in November, 1929, and again when he came with you (Mahan) I showed him both the \$2500 note and the trust deed. "I showed them to him twice." I got them out of the vault of the bank. * * I have been connected with the bank for twelve years. I had nothing to do with the drafting, etc., of the \$2500 note and trust deed. I made certain indorsements on the back of the note during the years 1927 and 1928 of monthly payments made. I did not then know that the trust deed securing the note had not been recorded. I did not look at it to see. * * The bank received the note for collection from the Morton Grove Lumber Co. "Mr. Fuhr (complainant) brought it in." When a payment was made on the note "it was credited to Fuhr's account." * * The Morton Grove Bank was closed by the State Auditor on September 9, 1931, * * I could not say when the bank first learned that Richard Knowles had purchased the property, but it was probably about the time the second trust deed (Exhibit 1) was recorded. I had nothing to do with its recordation.

The testimony of Richard Knowles and Henry Knowles (when called as complainant's witnesses), and that of defendant's solicitor (Mahan, called as defendants' witness), especially as regards notice to Richard Knowles of the existence of the second trust deed securing the \$2500 note, is in conflict with that of Kruse in some particulars. A part of the lengthy testimony of Richard Knowles on direct examination is as follows:

"I am living in St. Paul, Minnesota. Until recently I was a resident of Chicago. I never lived on the premises in question but I am the title holder of record of them. I acquired title from my brother, Henry, the latter part of November, 1929. I went to the Morton Grove Bank first in company with Henry early in November, 1929, and saw the cashier (Kruse). I wanted to see if the bank would renew the first mortgage on this house, which came due on December 1st. I also asked the cashier if there was a second mortgage on the property.

"Q. What prompted you to ask that question?

A. Well, Henry was talking about a second mortgage, but he couldn't find any record of it in his papers. * * He said he thought there was a second mortgage. * * It was for \$2500, as he said. And I went to the bank to inquire about it. * * I spoke to the cashier there -- this gentleman here (indicating Kruse). I asked him if the bank would renew the first mortgage and he said they would. I then asked him if there was a second mortgage on the property and he said 'No,' but that there was a contract note for \$2500. I asked him if he was sure of that and he said he was."

Later on I went over with Mr. Mahan to check up on these papers, the first and second mortgages, and to find out if they would renew the first mortgage. * * Mahan did all the talking at that time. He asked him (Kruse) about the second mortgage, and he (Kruse) replied that "there was not any second mortgage, but that there was a note on which my brother was paying" * * I don't recall exactly what Mahan then said. * * "I believe we asked the cashier

to show us the papers * * but he said he couldn't find them. He didn't show them to me. I never saw them."

I have been on the premises in question, off and on, every couple of months. My brother has lived there three or four years and is still there. He is paying me \$40 a month rent. I am getting the rent "off and on" * * I couldn't say how much he is behind in his rent. He has been paying it to my wife and son. * *

I paid \$600 cash for the title to the premises and gave the money to my brother * * I don't know what he did with the money; I never asked him. * * I also paid the interest on the first mortgage which was overdue, and whatever taxes that were due, in addition to the \$600. * * As to the value of the house on the premises, "I had a real estate man look it over and he told me it was worth about \$7,000." It is my contention that I bought the property subject only to the first mortgage of \$4,000, plus unpaid taxes and accrued interest. When I bought the property there was about \$4,000 due on the first mortgage. I have since made payments on it down to \$2,000. The total consideration paid or assumed by me was \$4,600 plus taxes and accrued interest. * *

When I bought the property there were no writings made with reference to the transaction except the deed that my brother gave me * *. Before I went to the bank and had the conversations with the cashier, "my brother had told me that there was a \$2,500 note against the property in addition to the first mortgage." When I first went to the bank "I knew that there was a note out, or some encumbrance on the property, other than the first mortgage." * * "I knew that there was a paper out somewhere, which my brother was making monthly payments on, and which was in addition to the first mortgage" * *. As I recall it, when my brother and I first talked it over, he said that "it was for \$2500, and that he had paid some \$600 or \$700 on it." * * "I went into it pretty thoroughly with my brother."

On cross-examination by his solicitor, Mahan, Richard Knowles further testified in part:

"I think my brother had a copy of this document, Complainant's Exhibit 2, which I have seen before" (the document referred to is the \$2500 note on the face of which, just above the signature of Henry Knowles and his wife, is the statement that "the payment of this note is secured by trust deed * * to August F. Poehlmann, as trustee, on real estate in the County of Cook and State of Illinois") "I have never seen complainant's Exhibit 1 (the trust deed) before." On my first visit to the bank, in company with my brother, I told the cashier (Kruse) that "my brother Henry is talking about a second mortgage, and I asked the cashier if there was a second mortgage on the property, and he said 'No.' He looked it up in a big book on his desk and said: 'It is a contract, paying on a contract.' Prior to that time I think I had looked over in a general way my brother's copy of complainant's Exhibit 2; I wouldn't say that I read it very thoroughly." * *

The first time I discussed with my brother, Henry, my purchasing the property from him was in the latter part of October, 1929, at his house. He stated that he didn't have a job or money and that he didn't think he could keep his house * *. "The summing up of the whole proposition is that they were going to take this house away from him and I said, 'Before I let them do that, I will buy it?' At that time I was familiar with what he paid for the house, with the amount of the first mortgage on it, and with the amount he had paid on this contract note. * * At the time I purchased

the property from him, we discussed the contents of Complainant's Exhibit 2. He agreed to keep paying on this note and to rent the property from me for \$40 a month. I have the lease here. He has paid me on it \$420. * * The agreement was that I should give him \$600 and assume the indebtedness on the house. I paid all these bills, -- taxes, assessments and everything. The insurance was paid at that time. I don't recall paying for any insurance. I have paid the taxes ever since, and to my knowledge there are no taxes due now, nor any special assessments."

Richard Knowles gave further testimony before the master, when called as a witness for defendants and examined by Mahan. He again gave his version of what transpired at the various interviews had at the bank with the cashier, Kruse, in November, 1929, testifying in part as follows:

About the middle of November I went to the bank a third time. It was on a Saturday and you (Mahan) were with me. We had to wait outside until the bank opened. Kruse opened the door. I introduced you to Kruse as my attorney. "You asked Kruse if there was a second mortgage on the house and he replied there was not, that the house was being bought by my brother under a contract note, and you asked him for the papers, and he said that the man who had charge of them was not there and he could not get them. You produced a copy of the contract note and asked him about the bottom paragraph on the contract and asked him where the trust deed was. He replied that he could not get the papers and did not know where they were." * * I first learned that there had been a second mortgage recorded against the property some time in February, 1930. * * Afterwards I saw you (Mahan) and we went to the recorder's office and found that there was a second mortgage recorded. That was the first information I had that a second mortgage was outstanding against the property. I am not holding the title to the property for the benefit of my brother, Henry, or for any other person than myself. There is no arrangement between him and me that the property is to be turned back to him.

John F. Mahan, defendants' witness, corroborated the testimony of Richard Knowles, as to what occurred at the interview had with Kruse at the bank about the middle of November, 1929. Henry Knowles corroborated Richard as to what was said at the first interview had with Kruse at the bank early in November, 1929.

Henry Knowles, when called as complainant's witness, further testified in part as follows:

"I got \$600 from my brother, Richard, for the property. I paid some debts with the money but I didn't bank a cent of it. The balance I used during the winter for living expenses. I kept at home. * * I made some payments on the \$2500 note with the money I got from my brother * * I had an agreement with him when I sold him the property that I should keep up the payments on the note. I discontinued paying on January 27, 1930 * * "In the first

conversation I had with my brother I told him there was a mortgage on the property over and above the first mortgage. * * I cannot say that I then told him the amount that was still due on that second mortgage, but I think it probable that something was said about the amount." * * I had and have in my possession a copy of Complainant's Exhibit 2 (the \$2500 note), but I never had a copy of complainant's Exhibit 1 (the trust deed).

And Henry Knowles, when called as defendant's witness, further testified in part as follows:

"The first time that I knew that Mr. Fuhr (complainant) was the owner of the \$2500 note was "around the latter part of February, 1930." Fuhr called at my house, and spoke about receiving a notice from the bank that certain payments on the note had not been made, and he wanted to know what I was going to do about them. "I told him I had received instructions from my brother not to make any more payments, that there had been a second mortgage recorded against the property and that I should stop making payments on the note; I further told him that if there was anything else he wanted to find out he should go to my brother or his attorney" * * There is nothing in writing to evidence the arrangement between my brother and myself relative to the sale of the property to him. * * The last payment on the \$2500 note was made on January 27, 1930. There was then due on that note \$1780. I am obligated on that instrument.

In urging a reversal of the decree appealed from (dismissing complainant's bill to foreclose said second trust deed for want of equity) counsel for complainant here make the following contentions in substance:

1. That the evidence shows that when Richard Knowles purchased the property from his brother he had actual notice of the existence of the unrecorded second trust deed, given to secure the \$2500 note held by complainant, and such notice was an effectual to bind him as a subsequent purchaser as if the deed had been recorded.

2. That the evidence also shows that Richard Knowles was informed of such facts as to put him upon inquiry as to the existence of the second trust deed, and that he did not sufficiently pursue investigations, in that, while he made certain inquiries at the bank (which held the \$2500 note for collection), he did not endeavor to ascertain who was the then holder of the note, or to make inquiries of him or of the trustee named in the trust deed (Pochlmann), whose name appeared as such in the copy of the \$2500

note, examined by Richard Knowles.

3. That the decree is erroneous in that the evidence sufficiently shows that Richard Knowles was not a bona fide purchaser without notice of the trust deed securing the \$2500 note.

4. That even if, during the conferences had between Richard Knowles and the bank's cashier (Krusse) during November, 1929, the cashier made erroneous statements to the effect that said note was only a "contract" note and that there was not any mortgage securing it (as testified to by the two Knowles' and Mahan, contrary to the testimony of said cashier), such statements were not binding upon complainant for lack of authority in said cashier or the bank to make them, - the note having been deposited with the bank only for collection.

In Section 30 of our Conveyances Act, in force July 1, 1872, (Gahill's Stat., 1931, Chap. 30, p. 706, where, in a note, it is stated that the section "is R. S. 1845, p. 108, par. 23, with word 'authorized' substituted for former word 'required'") it is provided (*italics ours*):

"All deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record."

In 23 R. S. L., p. 256, sec. 124, in an article on "Records," it is said (*italics ours*):

"The intention of the acts requiring deeds to be recorded is to secure subsequent purchasers and incumbrances against prior secret conveyances and fraudulent incumbrances; and therefore, when a person has notice of a prior conveyance, it is not a secret conveyance by which he can be prejudiced, and it is an elementary rule in the construction of recording laws that notice of an unrecorded instrument is equivalent to the recording of it, with respect to the person having such notice. An unrecorded deed, mortgage or other instrument affecting the title to land is valid, therefore, against a subsequent purchaser taking with knowledge or notice of the existence of the instrument". (*Citing numerous authorities including several Illinois cases.*)

notes, containing the following information:

1. That the owner is a resident of the United States.

2. That the owner is a resident of the United States.

3. That the owner is a resident of the United States.

4. That the owner is a resident of the United States.

5. That the owner is a resident of the United States.

6. That the owner is a resident of the United States.

7. That the owner is a resident of the United States.

8. That the owner is a resident of the United States.

9. That the owner is a resident of the United States.

10. That the owner is a resident of the United States.

11. That the owner is a resident of the United States.

12. That the owner is a resident of the United States.

13. That the owner is a resident of the United States.

14. That the owner is a resident of the United States.

15. That the owner is a resident of the United States.

16. That the owner is a resident of the United States.

17. That the owner is a resident of the United States.

18. That the owner is a resident of the United States.

19. That the owner is a resident of the United States.

20. That the owner is a resident of the United States.

21. That the owner is a resident of the United States.

22. That the owner is a resident of the United States.

23. That the owner is a resident of the United States.

24. That the owner is a resident of the United States.

25. That the owner is a resident of the United States.

26. That the owner is a resident of the United States.

27. That the owner is a resident of the United States.

28. That the owner is a resident of the United States.

29. That the owner is a resident of the United States.

30. That the owner is a resident of the United States.

31. That the owner is a resident of the United States.

32. That the owner is a resident of the United States.

33. That the owner is a resident of the United States.

34. That the owner is a resident of the United States.

35. That the owner is a resident of the United States.

In Bourland v. County of Peoria, 16 Ill. 538, 543, (decided in 1855) it is said: "The recording acts, for the purposes of information and constructive notice, have not altered or abolished the rules of equity, in relation to actual and constructive notice, by other means than the recording acts." In White v. Kirby, 42 Ill. 510, 511, it is said: "It has uniformly been held that actual notice and a knowledge of such facts as would necessarily lead a person acting in good faith to actual notice, are one and the same thing. A party cannot be permitted willfully to shut his eyes to what lies in his path, and then complain that he did not see." (See, also, Doyle v. Teas, 4 Scam. 202, 250; Morrison v. Kelly, 22 Ill. 609, 625; Aetna Life Ins. Co. v. Ford, 89 id. 252, 254; Anthony v. Wheeler, 130 id. 128, 135; Cassara v. O'Ferrall, 322 id. 589, 595.)

In Wood v. Amer. Nat. Bank, 14 Pac. Rep., 2nd, (Calif.) p. 110, 115, it is said:

"The phrase 'good faith' generally imports lack of notice by a purchaser of equities of third parties. In Bouvier's Law Dictionary a bona fide purchaser is defined to be 'one who buys property of another without notice that some third person has a right to, or interest in, such property, and pays a full and fair price for the same at the time of such purchase, or before he has notice of the claim or interest of such other in the property.' * * The general rule is that a purchaser or incumbrancer with notice of the equities of third persons cannot claim the protection afforded to purchasers in good faith. To hold that a purchaser or incumbrancer with such knowledge shall prevail because it appears that such purchaser or incumbrancer had no intention of defrauding the beneficiaries would serve to open the door to the perpetration of fraud."

In support of the above 4th contention of counsel for complainant, they cite the decisions and holdings in Halladay v. Underwood, 90 Ill. App. 130, 131-2 and Siekmann v. Stanton, 251 Ill. App. 442, 451-3. We deem them pertinent.

In view of the authorities referred to and considering all of the evidence as above outlined, we are of the opinion that there is substantial merit in all of complainant's counsels' four contentions,

in United States v. Smith, 100 F.2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The purpose of this report is to provide a summary of the findings of the investigation conducted by the Committee on the activities of the United States in the Pacific Islands. The report is based on the information received from the various sources mentioned in the report, and it is intended to provide a clear and concise summary of the facts and circumstances surrounding the activities of the United States in the Pacific Islands. The report is divided into two main parts: the first part deals with the general situation in the Pacific Islands, and the second part deals with the specific activities of the United States in the Pacific Islands. The first part of the report discusses the general situation in the Pacific Islands, including the political, economic, and social conditions. The second part of the report discusses the specific activities of the United States in the Pacific Islands, including the military, economic, and political activities. The report is intended to provide a clear and concise summary of the facts and circumstances surrounding the activities of the United States in the Pacific Islands, and it is intended to provide a basis for further investigation and action.

that under the evidence and the law the master's findings and recommendations were fully justified, that the court erred in not following said findings and recommendations and in not entering a decree of foreclosure in favor of complainant as prayed for in his bill and in the amounts as found in the master's report, including his fees. We fail to find in the present record any evidence of fraud, collusion or concealment on the part of any holder of the \$2500 note or the Merton Grove Bank in the failure to have said second trust deed, herein sought to be foreclosed, recorded within a short time after it was executed and delivered. We think that the fact that such recordation was delayed for a considerable period was the result of mere inadvertence or possible carelessness on the part of an agent or agents of the bank. While it is the law in this State that the report of a master on conflicting evidence is not given the same effect as the verdict of a jury in a case tried by a jury, nor the same weight that is given the findings of a chancellor who sees the witnesses and hears them testify, it is also the law that "in a case where the master has seen the witnesses and observed their manner and demeanor while testifying, the finding of facts made by him is entitled to due weight." (Keuper v. Mette, 239 Ill. 586, 593, and cases there cited.)

For the reasons indicated the decree of the circuit court of September 22, 1933, dismissing complainant's bill to foreclose the second trust deed on the premises in question, is reversed, and the cause is remanded with directions that a foreclosure decree be entered in favor of complainant, in accordance with the prayer of his bill, the findings and recommendations of the master as contained in his report and the views herein expressed by this court.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

[illegible]
$$f_{\text{max}} = \frac{1}{2\pi} \sqrt{\frac{1}{LC}} = \frac{1}{2\pi} \sqrt{\frac{1}{10^{-6} \times 10^{-3}}} = 159.15 \text{ kHz}$$

37310

AUGUSTA ANDERSON,
Plaintiff and Appellee.

v.

RELIANCE ELEVATOR CO., a
corporation, and VICTOR R.
ANDERSON,
Defendants.

RELIANCE ELEVATOR CO.,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

277 I.A. 610²

MR. PRESIDING JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

In an action for damages for personal injuries received by plaintiff in an automobile accident shortly before 2 o'clock in the afternoon of Tuesday, December 22, 1931, there was a trial before a jury during September, 1933, resulting in a verdict finding both defendants guilty and assessing plaintiff's damages at \$5,000. On October 21, 1933, after overruling motions for a new trial and in arrest of judgment, the court entered judgment on the verdict in that sum against the defendants jointly. By the present appeal of the Reliance Elevator Co., (hereinafter called the Elevator Co.) it is sought to reverse the judgment.

Plaintiff's declaration consisted of four counts, two of which were amended before the trial. In the amended first count it is alleged that on the day mentioned she was walking in an easterly direction along and upon the south crosswalk of Berwyn avenue (a street running east and west) in Chicago, at its intersection with North Ashland avenue (a street running north and south), and was at all times in the exercise of due care for her

1993

• *Callitriche* *sp.* *Callitriche* *sp.*

10

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 08-11-2010 BY 60322
UNCLASSIFIED

Source: *Journal of the American Statistical Association*, 1997, 92, 1039-1052.

Revised by the author in 1967.

The information provided by the respondents was used to develop a questionnaire to be distributed to all the respondents.

Downloaded At: 11:53 11 September 2009

© 2000 Blackwell Science Ltd *Journal of Internal Medicine* 247: 395–402

Building on this foundation, the next step is to explore the implications of these findings for the development of effective interventions and policies aimed at reducing the burden of mental health issues in the community.

own safety; that the Elevator Co. "was in possession or control of an automobile that was then and there being driven by Victor R. Anderson, its duly authorized agent and servant in that behalf, in a southerly direction, along and upon said North Ashland avenue;" that said Anderson, "in the course of his employment and as agent for the Elevator Co.," so negligently operated and managed the automobile that it ran against and over plaintiff and knocked her down upon the ground or pavement, whereby she suffered serious and permanent injuries, etc. In the second count it is charged that Anderson, "in the course of his employment as agent and servant of the Elevator Co.," so wilfully and wantonly "and with such reckless indifference to consequences," operated and managed the automobile, at a high and dangerous rate of speed, that it ran against and over plaintiff, etc. In the third count the gist of the negligence charged is the operation of the automobile at an excessive rate of speed in a residential district, contrary to the statute. In the fourth amended count the charge is the negligent violation of a particular statute set forth, requiring the operator of a motor vehicle, upon approaching a person walking upon or along a public highway, to give warning of the approach, and, if necessary, to stop the vehicle, etc. To all of the counts each defendant, by the same attorney, filed separate pleas of the general issue, and the Elevator Co. filed a special plea of non-ownership, operation or control of the automobile.

On the trial plaintiff was a witness in her own behalf. She gave her version of the accident and as to the character and extent of her injuries. Three other witnesses testified for her as to the accident. Her attending physician at the Edgewater hospital, to which she was taken immediately after the accident, also gave testimony, and he identified certain X-ray pictures which

were admitted in evidence. Plaintiff also called as her witness, Adolph C. Anderson (not related to defendant, Victor R. Andersen), secretary of the Elevator Co., and who had been subpoenaed by plaintiff to bring in the books and records "relating to the employment" of Victor R. Anderson in the company. He exhibited these records and testified at considerable length both on direct and cross-examination. Victor R. Anderson testified in his own behalf and also in behalf of his co-defendant, the Elevator Co., and defendants called as their witnesses, Harry Damitz, a police officer and who was at the hospital shortly after the accident, and Clifford Anderson, a son of Victor R. Anderson. The two defendants were represented at the trial by the same attorney. At the conclusion of plaintiff's evidence, and again at the close of all the evidence, defendants severally moved for directed verdicts in their favor, but the motions were denied.

On the present appeal the principal contention, made by counsel for the Elevator Co. as a ground for the reversal of the judgment, is in substance that the uncontradicted testimony of Victor R. Anderson and that of Adolph C. Anderson (plaintiff's witness), supplemented by a certain writing or "time ticket," disclose that Victor R. Anderson, at the time of the accident, was not driving the automobile as a servant of the Elevator Co., or then acting within the scope of his employment, but on the contrary was driving his own automobile on an errand of his own, wholly disconnected with said employment.

The testimony of plaintiff's witness, Adolph C. Anderson, is in substance that Victor R. Anderson was employed at intervals by the Elevator Co. to make repairs on elevators belonging to its customers; that when called upon by the Elevator Co. to make such repairs in different parts of the city, he did so, sometimes during

the day and sometimes at night; that sometimes he came to the company's shop early in the morning to inquire if there was any work for him that day; that sometimes he was telephoned at his home to go out and immediately do a repair job; that in going to the place where the job was he sometimes used his own automobile; that in doing any job the company furnished and paid for all necessary wire and other material and equipment, which were usually conveyed to the place by truck owned by the company; that he was an experienced man in making repairs on elevators where trouble had developed; that the arrangement with him was that whenever the company wanted a man to go out on a repair job for two, three or five hours, or longer, it would arrange to send him to the job; that he was paid for his time at regular or overtime rates; that he always made out a "time-ticket" for the work done by him, and was paid once a week on the regular payroll day for jobs done by him during the week; and that on Tuesday, December 22, 1931, he did no work for the company until after 4:30 p.m., when, at the company's call he went to the Illinois Athletic Club in Chicago and did some repair work on an elevator there, for which he made out the usual time-ticket, and afterwards was paid by the company for the work done, at overtime rates, as stated on the ticket. This ticket (introduced in evidence) discloses that overtime work includes work done after 4:30 p.m. on any day and until 8:00 a.m. the following day, or on Sundays or holidays, or on Saturdays, after 12 o'clock, noon; that certain repair work was done by Victor R. Anderson for the company at the Athletic Club on December 22, 1931, after 4:30 p.m.; that he worked 2-1/2 hours on the job, for which he subsequently was paid the sum of \$8, by the Elevator Co., plus a charge of 20 cents for carfare.

The testimony of Victor R. Anderson, on the questions of his negligence and plaintiff's contributory negligence at and

immediately before the accident, is in direct conflict with the testimony of plaintiff and her witnesses. On the questions of the nature of his employment with the Elevator Co., and whether at the time of the accident he was acting within the scope thereof and on its business, or on a mission of his own wholly disconnected with said employment, his uncontradicted testimony was in substance as follows: That he personally owned the automobile that he was driving at the time of the accident; that he had partially paid for it with his own funds; that the license was in his name; that he paid for all gasoline and oil needed to run it and for all other expenses for its maintenance and upkeep; that the Elevator Co. had no interest in it; that early on the morning of December 22, 1931, he left his home at 5732 Wayne street, Chicago, and went down town to the Elevator Co.'s shop to inquire if there were any jobs for him to do; that upon being informed that there was not, he returned to his home; that his son, Clifford, was doing extra holiday work at one of the plants or stores of Sears-Robuck & Co., and was due to arrive there at 12 o'clock noon; that his daughter had an engagement at another nearby place about the same time; that he drove both in his automobile, and after he had taken both to their respective destinations, he then started to go on "an errand of my own" to get a Christmas tree for his home which he had already arranged to purchase; that on the way the accident happened; that he took plaintiff to the Edgewater hospital in his automobile; that he was arrested, was taken to the Sumnerdale Police Station and later released upon giving bond; and that in the evening when he arrived home he found a telephone call from the Elevator Co. for him to go immediately to the Illinois Athletic Club on an emergency job; and that he went there and worked about 2-1/2 hours, for which he made the usual charge for overtime work and subsequently received payment therefor from the Elevator Co. The

testimony of the witness' son, Clifford, corroborated him as to his not working during the morning of December 22nd, and as to his taking him to Sears Roebuck & Co. about noon of that day.

In view of all the evidence, and particularly the undisputed testimony of the witnesses, Adolph C. Anderson and Victor R. Anderson, we are of the opinion that the Elevator Co. is in no way liable under the law to respond in damages to plaintiff for the injuries she received in the accident, and that the judgment against the Elevator Co. cannot stand. In Nelson v. Stutz Chicago Factory Branch, 341 Ill. 387, 393, it is said (italics ours): "The general rule is, that one who is injured by another's negligence must pursue his remedy against the person whose negligence caused the injury. Here, however, the relation of master and servant exists between the person guilty of the negligence and another sought to be held for the resulting damages, the negligence of the servant may be imputed to the master, and he may be held liable for the resulting damages if the servant guilty of the negligence was at the time acting in the master's business and within the scope of his employment. Outside the scope of his employment the servant is as much a stranger to his master as any third person." (See, also, Johanson v. Johnston Printing Co., 263 Ill. 236, 240; Bupp v. Balgreen Co., 270 Ill. App. 346, 354; Helm v. Bagley, 298 Pac. Rep. (Calif. App.) 826, 827.) In the cited Johanson case it is said: "If the servant step aside from his master's business for some purpose wholly disconnected with his employment the relation of master and servant is suspended. The act of the servant during such interval is not to be charged to his master."

Whether or not, under the conflicting evidence as to the negligence of Victor R. Anderson and as to plaintiff's contributory negligence at and before the time of the accident, said Anderson

and the fact that the same person was seen at the same place at the same time.

[illegible]

The above information was obtained from the records of the Department of Social Services, New York City, and is being furnished to you for your information.

the following statement, the defendant is not entitled to be treated as the owner, and because he paid \$1000 to the defendant's attorney

at the bottom of the page. The text is as follows:

1. The following information was obtained from the records of the Federal Bureau of Investigation, Department of Justice, Washington, D. C., on the subject of the above-captioned case:

1. The first part of the document is a letter from the author to the reader, explaining the purpose of the study and the methods used. The letter is dated 1964 and is addressed to the reader.

should be held liable to respond in damages for plaintiff's injuries is a matter about which we express no opinion at this time. (See Prochter v. Grenhelm, 242 Ill. App. 93, 100.) But even though it could be held under the evidence that said Anderson was legally liable for plaintiff's damages the present judgment cannot stand even as to him. The judgment is a joint one against him and the Elevator Co., and as such is a unit, and as it must be reversed against the Elevator Co., it must also be reversed as to him. (McDonald v. Wilkie, 13 Ill. 22, 26; Seymour v. Richardson Fueling Co., 205 id. 77, 82; South Side Elevated R. Co. v. Nesvig, 214 id. 463, 469; Livak v. Chicago, etc. R. Co., 299 id. 218, 226-7.)

Complaint is also made of the giving by the court of certain instructions offered by plaintiff, upon the ground that each in effect directed a verdict for plaintiff and did not include all the necessary elements. In our opinion some of these instructions are erroneous for the reason stated, but as this case may be tried again ~~against Victor E. Anderson as sole defendant~~, and as the errors complained of probably will not be repeated, it is unnecessary for us to discuss the instructions.

For the reasons indicated the judgment of the superior court of October 21, 1933, appealed from, is reversed and the cause remanded.

REVERSED AND REMANDED.

Scanlan and Sullivan, JJ., concur.

37332

SAMUEL GOODMAN,
Complainant,

v.

SOL. K. GRAFF et al.,
Defendants.

BESSIE SOLOMON, Executrix
of the Estate of Joseph
Solomon, deceased,
Cross-complainant and Appellant,

v.

SAMUEL GOODMAN et al.,
Appellees.

277 I.A. 610³

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On November 3, 1931, Samuel Goodman filed a bill to foreclose a first trust deed, executed and delivered by Sol K. Graff and Ida R. Graff, his wife, on December 21, 1927, conveying to the Chicago Title & Trust Co., as trustees, certain improved premises in Cook county, known as Lot 4 in a certain resubdivision and also known as No. 4009 West Roosevelt road, Chicago. The trust deed was given to secure three notes, aggregating \$20,000, executed and delivered on said date by Graff and wife and due respectively in three, four and five years. Ida R. Graff was the owner of the premises, as well as another improved lot, immediately to the west, known as 4011 West Roosevelt road. On November 15, 1928, Graff and wife, to secure their note of that date of \$50,000, executed and delivered their second trust deed, conveying said lot 4, and other property, to the Lake Shore Trust & Savings Bank, as trustee. The two trustees, as such, were made parties to complainant's bill;

8578

1. *Chrysomelidae* (Coleoptera): 10 species, including *Chrysomelids* and *Chrysomelids*.

2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841.

[illegible]

• 2018 年 12 月 20 日 星期三

* Please use the primary and secondary forms as instructed particularly, and

On November 11, 1941, the following information was received from the Bureau of Investigation, Washington, D. C., regarding the activities of the German submarine U-100, which was reported to have been sighted in the vicinity of the coast of the United States on November 10, 1941. The information was received from the Bureau of Investigation, Washington, D. C., and is being furnished to you for your information.

also others, including Joseph Solomon, a mechanic's lien claimant. On December 31, 1931, it appearing that Solomon had died on June 6, 1931, prior to the filing of said bill, and that his widow, Bessie Solomon, had duly been appointed executrix of his will and had qualified and was acting as such, she, by order of court, was made a party defendant to the bill, in lieu of said Solomon, deceased. Thereafter on February 1, 1932, Bessie Solomon, as such executrix, filed an answer and intervening petition, setting forth the details of said claim for mechanic's lien, and it was ordered that her answer and intervening petition stand as a cross bill. After certain defendants had been defaulted and after the issues had been joined as to the remaining defendants, the cause was referred to a master to take evidence and report his conclusions of law and fact. Thereafter considerable oral and documentary evidence was introduced before him. His report was exhibited during May, 1933, and certain objections were presented thereto by Bessie Solomon, as executrix, etc., and by complainant. All objections were overruled and the report was filed on May 24, 1933, and it was ordered that the objections stand as exceptions before the court. In the report the master made the following findings in part:

That the notes for \$20,000, and the first trust deed securing them, were executed and delivered on December 21, 1927, by the Graffs, who have failed to carry out the terms and conditions of said deed by them to be performed and are in default; that complainant, as owner and holder of the notes, has declared the entire indebtedness due, amounting to \$23,650.84, and that complainant "has a first, paramount and existing lien on the real estate involved;" that the note for \$50,000, and the second trust deed securing it, were executed and delivered by the Graffs on November 15, 1928; and the Lake Shore Trust & Savings Bank in its individual capacity is the owner and holder of said note and interest coupons; and that there is due to the Bank thereon the total sum of \$66,147.63, which "has a valid and existing second lien on the real estate involved, but subordinate and inferior to the lien of complainant."

That Joseph Solomon had been engaged as a general building contractor in Chicago; that about May 19, 1930, during his lifetime he entered into a written contract with Sol K. Graff with the consent of Ida R. Graff, whereby he agreed to "alter and remodel" said

also show, however, that the...
 On December 21, 1951, it was...
 1951, prior to the...
 witness, that this...
 testified and...
 a party...
 testimony on...
 filed an...
 of said...
 where and...
 statements...
 as to the...
 to have...
 other...
 the...
 objectives...
 etc., and...
 report...
 objectives...
 matter...
 That the...
 interest...
 by the...
 lines of...
 their...
 the...
 completed...
 certain...
 about...
 November...
 indicated...
 interest...
 level...
 from...
 in the...

That...
 evidence...
 on...
 from...
 in the...

building owned by Ida R. Graff at 4009 West Roosevelt Road, and "cut an opening in the brick wall" between it and the building immediately to the west at 4011 West Roosevelt Road, for the sum of \$4400; that he made said alterations and remodeling and completed the work according to the contract on November 2, 1930; that he also did extra work with the approval of the Graffs, amounting to \$200; that he was paid \$1,000 on account, and received a note of Sol K. Graff in the sum of \$3600, for the balance due, on which only \$191 has been paid thereon; that within apt time, on February 9, 1931, he filed in the office of the clerk of the circuit court a statement of his claim for mechanic's lien in conformity with the statute; that all of the work and materials furnished and delivered under the contract, including said extra work, were used upon the premises; and that the front entrance to the premises at said 4009 West Roosevelt Road was eliminated and the present front entrance is through a passageway and entrance at 4011 West Roosevelt Road, "thereby impairing the value and use of the second floor of the premises at 4009 West Roosevelt Road."

"(20). That the construction of one entrance to the second floor for the two buildings has decreased the sale value of the premises as separate buildings."

"(21). That the stores after the remodelling and alterations, as aforesaid, are very narrow and have a limited use."

"(22). That the expert testimony offered relative to the value of the premises before and after the making of said improvements, for the purpose of determining an enhancement, if any, is very conflicting."

"(23). That said alterations and remodelling did not enhance the value of the premises and that said lien claimant is not entitled to a prior lien upon the premises for any sum."

"(24). That said Bessie Solomon, executrix, etc., has a valid lien on said premises for the total sum of \$3,879.12."

"(25). That the lien of said Bessie Solomon, executrix, etc., is subject, subordinate and inferior to the lien of complainant under the trust deed herein sought to be foreclosed, and to the lien of the Lake Shore Trust & Savings Bank."

(27-31). That after the preparation of this report a new solicitor was substituted as the solicitor for Bessie Solomon in lieu of the one who formerly had been acting; that thereafter said new solicitor, under leave granted, caused to be introduced further testimony on behalf of Bessie Solomon; but that this new testimony is not sufficient to warrant any modification of the master's findings as above set forth.

"(32). * * That all material allegations of complainant's bill, and amendments, have been proven and sustained by the evidence; that the equities of the cause are with complainant and said defendant (Lake Shore Trust & Savings Bank), as set forth in this report; and that the master recommends that a decree be entered in accord therewith."

After a hearing before the chancellor upon the exceptions to the master's report, the court, on November 8, 1933, entered the

decreed appealed from, in which the court overruled all exceptions and confirmed said report, and made findings in substantial accord with those of the master, including findings that (k) of the remodelling work done on the premises, the eliminating of the old front entrance to the 2nd floor of 4009, and the putting of the present front entrance thereto through a passage and entrance at 4011, "has impaired the value and use of said second floor of the premises at 4009 West Roosevelt Road;" that (l) "the construction of one entrance to the second floor for the two buildings "has decreased the sale value of the premises as separate buildings;" that (m) because of the making of the alterations, "the stores are very narrow and have a limited use;" that (n) the alterations, etc., "did not enhance the value of the premises, and that said lien claimant is not entitled to a prior lien upon the premises for any sum;" that (o) said lien claimant has a valid and subsisting lien upon the premises "for the sum of \$3,409, together with interest at 5% per annum from November 2, 1930, to January 2, 1931, on \$3,600, and with interest at 5% per annum on \$3,409, from January 2, 1931, and \$97.30 for reporter's services, etc., but that said lien "is subject, subordinate and inferior to the lien of complainant and the lien of the Lake Shore Trust & Savings Bank." And the court ADJUDGE AND DECREE that if the defendants, or some one or more of them, do not pay or cause to be paid to complainant, (Goodman), within 3 days, the sum of \$25,755.34, together with interest thereon, and costs and expenses, etc., the premises be sold by the master in the usual manner, etc.

It is provided in section 16 of our present Mechanics' Liens Act (Cahill's Stat., 1933, Chap. 82, p. 1769, as follows:

"No incumbrance upon land, created before or after the making of the contract under the provisions of this act, shall operate upon the building erected, or materials furnished, until a lien in favor of the persons having done work or furnished material shall have been satisfied, and upon questions arising

between incumbrancers and lien creditors, all previous incumbrances shall be preferred to the extent of the value of the land at the time of making of the contract, and the lien creditor shall be preferred to the value of the improvements erected on said premises, and the court shall ascertain by jury or otherwise, as the case may require, what proportion of the proceeds of any sale shall be paid to the several parties in interest. All incumbrances, whether by mortgage, judgment or otherwise, charged and shown to be fraudulent, in respect to creditors, may be set aside by the court, and the premises freed and discharged from such fraudulent incumbrance."

Counsel for appellant contends that the court's decree (wherein it is found in substance that Solomon's said work did not enhance the value of the premises and that appellant's lien is subject and inferior to the respective mortgage liens of complainant and the Lake Shore Trust & Savings Bank) is against the manifest weight of the evidence. And counsel argues in substance that it appears from the preponderance of the evidence that Solomon's said work enhanced the value of the premises at least to the sum of \$10,000. And counsel also contends that the court's further finding (that the stores in question, after the remodelling, "are very narrow and have a limited use") is not decisive of the main question at issue. And counsel also contends that the decree is faulty in that no findings are contained therein as to the market value of the premises both before said work was commenced and after it was completed.

On the hearing before the master appellant, to sustain her lien claim, introduced the testimony of four real estate experts, and complainant called as a witness one real estate expert, William J. Klibanow. For appellant, Sol K. Graff, husband of Ida R. Graff, the record title owner of the premises, testified that the work done by Joseph Solomon was fully done in accordance with the terms and conditions of the contract. And, as a real estate expert, Graff further testified that he had been in the real estate business in Chicago for about 15 years and was acquainted with the value of the premises; that in his opinion, before the work was commenced in May, 1930, their fair market value was \$40,000, and that after the work

was completed in November, 1930, such value was between \$50,000 and \$60,000; that for five years prior to the commencement of the remodelling work a silk concern occupied the first floor store at a rental of \$100 a month; that the work was done to meet the demands of two new tenants; and that after the work was completed the United Cigar Store Co. and the Dutch Mill Candy Co. occupied respectively the two stores, each paying a rental of \$125 a month, "plus a percentage." A. J. Eisenburg testified that the market value of the premises before the work was commenced was \$40,000, but that he had no opinion as to their value after the work was completed. Charles A. Kulvin testified that before the work was commenced the fair market of the premises in his opinion was about \$37,000 or \$38,000, and that after the work was completed such value was about \$55,000 or \$57,000. Samuel H. Ward, a real estate appraiser and expert, testified that before the work was commenced the fair, market value of the premises, in his opinion, was \$25,000, and that after the work was completed such value was \$35,000.

Complainant's sole witness as to values, Klibanow, testified in substance that the fair, market value of the premises before said work was commenced was, in his opinion, the sum of \$32,500; that because of said remodelling work there "was no increase in the value of the property." He gave certain reasons for his opinion why there had been no increase, which we have carefully considered but are of the opinion that they are based upon the possible increase in maintenance of the premises, without taking into consideration the larger rents thereafter obtained.

After reviewing the entire evidence we have reached the conclusion that the court, following the findings of the master, erred in the entry of the decree wherein it was found and adjudged in substance that the alterations and remodelling work, as done by Solomon,

did not enhance the value of the premises, and that, although appellant is entitled to a mechanic's lien on the premises in the sum mentioned, such lien in its entirety is inferior and subordinate to the respective liens of complainant and the Lake Shore Trust & Savings Bank, as holders of the notes secured by the first and second mortgages. We think that it sufficiently appears from a preponderance of the evidence that Solomon's said work so enhanced the value of the premises that the fair, market value of them in November, 1930, had been increased to the extent of more than \$5,000. Under the provisions of the above quoted statute appellant, as the lien creditor, is entitled to be "preferred to the value of the improvements erected," while the two prior mortgage incumbrancers are entitled to be "preferred to the extent of the value of the land at the time of the making of the contract." And because of these provisions and such evidence as appears in the present record, the decree as entered cannot be allowed to stand. Accordingly it is reversed and the cause is remanded for further proper proceedings and the entry of another decree, in accordance with said statute and consistent with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

37342

VICTOR A. DORSEY & CO., a corporation,
and VICTOR A. DORSEY, for use of
ELI H. BROWN, Jr.,
Appellees,

v.

CENTRAL REPUBLIC TRUST CO., a
corporation, Garnishee,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

277 I.A. 610⁴

MR. PRESIDING JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

On September 14, 1932, in the municipal court, Eli H. Brown, Jr., recovered a judgment for \$1,595.79, against Victor A. Dorsey & Co., a corporation (hereinafter called the Dorsey Co.) and Victor A. Dorsey. On November 10, 1932, after execution on the judgment had been returned unsatisfied, Brown, as beneficial plaintiff, commenced the present garnishment suit against the Central Republic Trust Co., as garnishee, (by its then name and hereinafter called the bank.) Thereafter, on April 20, 1933, another garnishment suit, also based upon a judgment against the Dorsey Co. and Dorsey, was commenced in the same court by Joseph Harris, as beneficial plaintiff, against the same bank as garnishee. Thereafter, by stipulation and order of the court, the two garnishment cases were consolidated for hearing, and a trial was had on one record before the court without a jury. On December 4, 1933, the court entered its finding and judgment in each case. In the present case it found the issues against said garnishee bank and entered judgment against it in favor of Brown in the sum of \$1,695.95. In the Harris case it made a similar finding in his favor and entered a separate judgment against the garnishee bank for \$7,388.74. From these judgments separate appeals were perfected in this court. There-

VICTOR A. BORSEY & CO., a corporation,
and VICTOR A. BORSEY, for one of
all N. A. Borse, Jr.,
Appellants,

vs.

CENTRAL REPUBLIC TRUST CO., a
corporation, appellee,
Defendant.

MR. JUSTICE THURGOOD TWISS delivered the opinion of the court.

On September 12, 1921, in the municipal court, St. Louis, Missouri, a judgment was rendered for \$1,800.00 against Victor A. Borsey & Co., a corporation, (hereinafter called the Borsey Co.) and Victor A. Borsey, for payment of \$1,800.00, which judgment on the judgment had been returned against the Borsey Co. and Victor A. Borsey, as defendants, in the municipal court, St. Louis, Missouri, on April 12, 1921. The Borsey Co. and Victor A. Borsey, as defendants, in the municipal court, St. Louis, Missouri, on April 12, 1921, commenced the present proceedings against the Central Republic Trust Co., as appellee, (as the same name was hereinafter called the bank.) The bank, on April 12, 1921, another judgment was also rendered against the Borsey Co. and Victor A. Borsey, for payment of \$1,800.00, which judgment was also rendered in the same court by Joseph Harris, as presiding judge, against the Borsey Co. and Victor A. Borsey. Thereafter, by stipulation and order of the court, the two judgments were consolidated for hearing, and a trial was had on one record before the court without a jury. On January 12, 1922, the court entered its judgment and judgment in favor of the Borsey Co. and Victor A. Borsey, and judgment was entered for the Borsey Co. and Victor A. Borsey, for payment of \$1,800.00, in the Borsey Co. case. It was a criminal judgment in the Borsey Co. case and a separate judgment against the Borsey Co. and Victor A. Borsey, for payment of \$1,800.00, was entered in this case.

COURT OF CHICAGO

STYIA. 610

after in this court, under stipulation of the parties, an order was entered to the effect that the two appeal causes be consolidated for hearing; that the complete record filed, and the abstracts and briefs to be filed, in cause No. 37343 (the Harris case), be taken and considered as such in the present cause (No. 37342; and that the opinion to be rendered here in cause No. 37343 stand as the opinion of this court in the present cause.

We have this day filed an opinion in said cause, No. 37343. For the reasons stated in that opinion, the judgment of the municipal court of December 4, 1933, rendered in favor of the beneficial plaintiff, Brown, and against the garnishee bank, Central Republic Trust Co., garnishee, for \$1,695.95, is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

37018

GEORGE C. SCHMITZ,
Appellee,

v.

WALGREEN COMPANY,
a corporation,
Appellant.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

277 I.A. 611¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action in assumpsit brought by plaintiff, George C. Schmitz, as assignee of Arnold Electric Company, against Walgreen Company, a corporation. The case was tried by the court, the issues were found for plaintiff, and his damages assessed at \$13,831.76. Defendant appeals from a judgment entered upon the finding.

The declaration consists of the common counts. Defendant filed the plea of the general issue.

The account sued upon, as shown by the bill of particulars filed by plaintiff, is as follows:

"Walgreen Company, a corporation
to
George C. Schmitz, Assignee of
Arnold Electric Company, Dr.

| | |
|---------------------------------------|--------------------|
| Patterns and Molds | \$ 2,175.03 |
| Experimenting Materials | 539.93 |
| Experimenting Labor | 3,023.75 |
| Dies and Tools Material | 1,653.50 |
| Dies and Tools Labor | 1,307.37 |
| Direct Material | 4,485.96 |
| No. 20 Dispenser Parts | 567.98 |
| Shipping Material | 104.49 |
| Productive Labor | 1,972.55 |
| Plating and Polishing | 846.18 |
| R. R. Fare and Miscellaneous | 372.27 |
| Burden 120% of labor (overhead) | 7,564.40 |
| Reasonable Profit (10% of cost) | 2,461.34 |
| | <u>\$27,074.75</u> |
| Received on account | 12,500.00 |
| | <u>\$14,574.75</u> |

43

ST. ALG.

[illegible]

Plus interest at 5% per annum to date
of judgment on unpaid balance
(amounting on this day, January 23) to

| | |
|--|--------------------|
| | 1,016.40 |
| | <u>\$15,591.15</u> |

The trial court disallowed the "reasonable profit" item, \$2,461.34, and allowed interest at five per cent from August 15, 1930, amounting to \$1,716.32, and entered judgment for \$13,831.76.

The brief of defendant commences with this statement:

"There are no disputed issues of fact. Broadly, there are only two questions presented by the appeal: First, whether the evidence, as a matter of law, established a cause of action, and secondly, whether a recovery may be had under the common counts." Plaintiff states that his action is brought to recover "for the reasonable cost of work, labor and materials expended in the experimental and constructive fabrication of a machine for dispensing malted milk drinks, mixed with water instead of milk, at the instance and request of the Walgreen Co. to carry out an idea of that well-known chain-store drug and soft drink dispensary, for which the Walgreen Co. said it would pay all expenses involved if the article proved a failure. The action also includes a small item for 200 machines sold and delivered."

All the oral testimony and nearly all of the documentary evidence was introduced by plaintiff. Arnold Electric Company (hereinafter also called Arnold Co.) was engaged in the manufacturing business at Racine, Wisconsin. Defendant operates a chain of drug stores.

Russell A. Blish, sales manager of Arnold Co., testified that in the early part of the summer of 1929 he had a conversation with Walgreen Sr., president of defendant, in the latter's private office in Chicago; that Walgreen, Sr., said they were anxious to have a machine made that would dispense a powdered product in water

for malted milks in place of raw milk, as they were having considerable complaints in reference to raw milk and were in constant conflict with the health authorities; that they had tried out a certain powdered product which they thought would make a satisfactory malted milk; that his idea of a machine might not be worth anything, "but if the Arnold Electric Company would design or attempt to design something for him that they would pay all expenses involved;" that some of the members of the organization told him that their relations with Arnold Co. were very satisfactory and he thought that company "would be the people to design the appliance;" that the witness said that Arnold Co. would be glad to work with him on that basis and that they had better have a written agreement, but Walgreen, Sr., said, "No, we know that you people will treat us fairly and it is certainly our intention to treat you fairly," and "if the machine is a success and they should later want to sell it to other soda fountains that it would offer an opportunity to Arnold; that Arnold would be the manufacturer of the machine subject to the conditions that the Walgreen Company would afterward fix;" that defendant was to have the exclusive sales of the machines and "that the article would belong to the Walgreen Company but the Arnold Electric Company could be the sole manufacturer of it;" that Walgreen, Sr., stated "very definitely that he didn't know whether the article offered any merit or not and that if the Arnold Company would design it and if it
proved ^{to be} a flop he would pay all expenses involved;" that the witness subsequently discovered that the "powdered product" was not powdered milk; that after the witness had detailed his talk with Walgreen, Sr., to Schmitz, president of Arnold Co., Schmitz gave Mr. Flegel instructions to design the required machine; that Flegel designed a machine which Walgreen, Jr., and Fletcher, a buyer for defendant, saw about one week later; that they said Walgreen, Sr., "is very

for raised milk in place of raw milk, as they were having considerable trouble in reference to the milk and were in constant conflict with the health authorities; that they had tried out certain patented product which they thought would make a satisfactory raised milk; that in case of a washing might not be worth anything, but in the event of a loss of money or effort to be in something for him that they would pay all expenses involved; that some of the members of the organization told him that their relations with Arnold were very satisfactory and he thought that company "would be the people to design the appliances"; that the witness said that Arnold Co. would be glad to work with him on that basis and that they had better have a written agreement, but "I agree," he said, "so, we know that you people will treat us fairly and it is certainly our intention to treat you fairly," and "if the machine is a success and they should later want to sell it to other people I understand that it would be an opportunity to Arnold; that Arnold would be the manufacturer of the machine subject to the conditions that the witness company would afterwards fix; that defendant was to have the exclusive sale of the machine and "that the article would belong to the witness company but the Arnold Machine Company could be the sole manufacturer of it," that witness, Mr. [redacted] stated "very definitely that he didn't want the article offered any more or not and that if the Arnold Machine Company decided to do it it proved to [redacted] to be [redacted] that the witness subsequently discovered that the "patented product" was not patented milk; that after the witness had decided his case with defendant, Mr. [redacted] Schmidt, president of Arnold Co., Schmidt gave Mr. [redacted] instructions to design the regulated machine; that [redacted] designed a machine which witness, Mr. [redacted] and [redacted], a buyer for defendant, now about one week later; that they said [redacted], "it is very

much interested in this machine and they were there to see that we didn't go to sleep on the job," and they and the witness agreed that the Flegel machine was not satisfactory; that then Arthur P. Jorgenson, superintendent of Arnold Co., stated that he had an idea concerning a machine and stated some of the details of it, and Fletcher and Walgreen, Jr., said that it "offered possibilities," that Walgreen, Jr., and Fletcher made other trips to the Arnold Co. plant, on one of which they stated that they were there to see the Jorgenson machine, and they waited in the plant until 3:30 the next morning, until the design was completed; that Jorgenson demonstrated the machine and they were enthusiastic about it; that some time later this machine was placed in operation, by the witness, at a Walgreen drug store in Chicago; that the witness received from defendant a letter, dated August 2, 1929:

"We do not think it necessary to bring your sample machine down here, since we are satisfied with its operation. However, we would like the five or six machines which are to be delivered in about a week to be completed as quickly as possible. * * *

and that the machines mentioned in that letter were manufactured by Arnold Co. and installed in defendant's store at State and Randolph streets; that he was present when the original first "complete design" machine was installed at defendant's store at Bowen and Cottage Grove avenues; that Schmitt, defendant's secretary, Walgreen, Jr., and Fletcher "congratulated the Arnold Company on the design of the machine," and they "mixed various malted milks using this powdered product and this water," and said "they were well pleased with the operation of the machine and character of the drink it produced;" that they and Walgreen, Sr., then approved the machine and told the witness "to place an order for 300 machines and they told me * * * that it was the intention of the Walgreen Company to equip all their fountains with these machines involving not less than one thousand of them. They had at that time over 400 drug stores and they figured

much interested in this machine and they were anxious to see it. We didn't go to sleep on the 10th, and they and the witness stayed at the hotel machine was not satisfactory; then they left. Testimony, explanation of this fact, stated that he had no idea concerning a machine and that one of the details of it, and Webster and Wilson, Jr., said that it looked satisfactory. That afternoon, 11th, and Webster and Wilson, Jr., said that on one of which they stated that they were there to see the Morgan machine, and they waited in the night until 11th the next morning, until the 12th was reached; the Morgan was demonstrated the machine and they were enthusiastic about it; that some time later this machine was placed in operation, by the witness, at a distance of 100 feet in front; that the witness received from Webster a letter, dated August 24, 1900. We do not think it necessary to bring your engine machine down here, since we are satisfied with the operation. However, we would like to have a machine which we can be delivered in about a week to be completed as quickly as possible. And that the machine mentioned in that letter was manufactured by Arnold Co. and installed in defendant's store at State and Randolph streets; that he was present when the original first "complete design" machine was installed at defendant's store at Town and College above mentioned; that Webster, defendant's secretary, Wilson, Jr., and Webster suggested to Arnold Company on the design of the machine, and they "showed various milk cans and power product and cake cases," and said "they were well pleased with the operation of the machine and the result of the work is excellent;" that they and Wilson, Jr., then approved the machine and told the witness to place an order for 100 machines and they told him that it was the intention of the witness company to sell all their machines with these machines involving no loss from one thousand of them. They had at that time over 400 such engines and they figured

an average of not less than two per store. Some stores would require as many as six and no store would require less than one;" that the machine was "known as the Walgreen Combination Dispenser," and its factory number was 21; that Walgreen, Sr., in the original talk with the witness, stated that he desired a machine that would dispense six ounces of water and approximately one-half of one ounce of the powdered product; that in August, 1929, Walgreen, Jr., telephoned the witness that they had decided to change from plain to carbonated water; that to make the change required a carbonating machine and defendant, upon request, shipped Arnold Co. "a carbonator;" that defendant from time to time requested that certain changes be made in the machine, which changes were made; that after the machine had been changed to dispense carbonated water the witness, in January, 1930, submitted it to Schmitt, Fletcher and Walgreen, and it was taken to a Walgreen store and installed and operated; that they "mixed several malted milks and Schmitt, Fletcher and Walgreen all spoke that they were well satisfied with the drink and also with the operation of the machine;" that on January 6, 1930, Arnold Co. sent the following letter to "Mr. C. R. Walgreen, President, Walgreen Company:"

"Attached you will find the agreement we discussed personally.

"Our developing and experimenting expense to January 1st, 1930, amounts to \$4,149.43. We believe that you will find the machine as now constructed entirely satisfactory for use with carbonated water, and that no further substantial expenditures for experimenting will be necessary.

"Because of the patterns and fixtures made obsolete by changing from the use of plain to carbonated water, our cost of the equipment to produce the machine is changed from \$4,860.61 to \$5,610.96.

"The monel lining, tinning, silver plating, and other increased costs involved in making the machine suitable for use with high pressure carbonated water considerably increases our cost. We have again carefully checked our estimated cost, and figure we can supply the machine at \$37.50 constructed for use with carbonated water.

"If you find the agreement submitted satisfactory, we shall appreciate the return of one signed copy for our files."

an average of 100 lbs. per acre. I am sorry to say
that the results were not as good as we had hoped for. The
and the results were not as good as we had hoped for. The
talk with the witness, stated that he had a machine that could
discharge six acres of water in approximately one-half of one
ounce of the powdered product; that is, 1900, 1900, 1900, 1900,
telephoned the witness that they had decided to change from plain
to carbonated water; that he made the change without a corresponding
machines and equipment. When present, shipped to the
personnel; that defendant from time to time requested that certain
changes be made in the machines, which changes were made; that after
the machine had been changed to discharge carbonated water the dis-
charge, in January, 1900, defendant is to defendant, Fletcher and al-
green, and it was taken to a witness for and installed and
operated; that they asked several other witnesses, Fletcher
and defendant all agree that they were well satisfied with the drink
and also with the operation of the machine; that on January 6, 1900,
defendant for sent the following letter to Mr. G. H. Fletcher,
President, Ferguson Company:
"I enclose you will find the agreement as discussed pre-
viously.
Our development and experimental work was to January 1st,
1900, amount to \$4,100.00. We believe that you will find the
machine as we constructed a fairly satisfactory one for use with car-
bonated water, and that no further substantial expenditure for
experimental work will be necessary.
"The use of the machine and the work made possible by
operating from the use of plain to carbonated water, our cost at
the equipment to produce the machine is about \$1,000.00 to
\$1,500.00.
"The money required, including labor, material, and other
incidental costs involved in making the machine suitable for use
at high pressure carbonated water would be approximately \$1,000.00
cost. I have again carefully checked our estimated cost, and
figure as our supply and working at \$1,000.00 approximately for use
with carbonated water.
"If you find the machine and work satisfactory, we
shall appreciate the return of the signed copy for our files."

The letter inclosed a proposed agreement that was never executed. The witness further stated that prior to writing that letter he had seen Walgreen, Sr., and Schmitt and delivered to them an itemized statement which showed the approximate amount already expended by Arnold Co. and "the expenses the Arnold Electric Company had gone to in the manufacture of tools and dies," and during the conversation in reference to the statement the Walgreen people stated that they were satisfied with the machine and would equip all Walgreen stores with it, and that they would require "not less than one thousand machines;" that the figure quoted in the letter, \$37.50, was the result of that conversation. The witness further testified that from January 6, 1930, to March 5 Arnold Co. manufactured the machines, and in February, 1930, Walgreen, Sr., Walgreen, Jr., and the witness went to New York to attend a convention of chain stores; that one of the dispensers was installed and operated in a Walgreen store on Broadway, and Walgreen, Sr., made a speech about it to the convention and invited his fellow chain store executives to see it in operation, and "I was introduced to most of the big lights of the chain store business by Mr. Walgreen, and we mixed malted milks and everybody had a malted milk mixed on the machine and they all said it was great;" that Walgreen, Sr., said it was wonderful. The witness further testified that prior to that time he had had numerous talks with the Walgreen officials in regard to an agreement between the two companies; that Walgreen, Sr., said "it was his wish to sell this machine to other soda fountains;" that defendant was to be the owner of the machine and Arnold Co. was to manufacture it and also have the right to sell it, under an arrangement that would prove satisfactory to defendant; that the witness submitted a number of agreements to Schmitt and there were many conversations in reference to them but none was ever

The latter stated a previous agreement had been made between
the witness and the other party to the effect that the latter
had been assigned, by the witness, and delivered to them as
stated in the statement which appears in the exhibit marked "A"
exhibited by the witness, and the witness the Arnold Electric
Company has gone to in the many cases of tools and dies, and
during the conversation in reference to the witness the witness
stated that they were satisfied with the machine and would
accept all the work done with it, and that they would require
"not one more of these machines," that the witness stated in
the latter, 1934, was the result of that conversation. The
witness further testified that from January 1, 1935, to March 3
1935, he manufactured the machines, and in February, 1935,
March, 1935, April, 1935, and the witness went to New York to
attend a convention of chain stores; that one of the witnesses was
testified and operated in a foreign store in Broadway, and the witness
made a speech about it to the convention and invited his fellow
chain store executives to see it in operation, and "and introduced
to most of the big lights of the chain store business by Mr. Al-
green, and we showed him the machine and very much had a mixed milk
taken on the machine and they all said it was good; and the witness
said it was wonderful. The witness further testified that prior
to that time he had numerous talks with the witness officials
in regard to the agreement between the two companies and the witness
said "it was his wish to sell this machine to the witness
company," that defendant was to be the owner of the machine and
that he was to manufacture it and the witness was to sell it,
under an agreement that would prove satisfactory to defendant;
that the witness admitted a number of agreements to defendant and
there were many conversations in reference to them but none were ever

executed, "for the reason that the machine was a blow-up. That is the reason they never signed it;" that defendant gave Arnold Co. an order for 300 machines and then another order for 300 machines, and then Schmitt telephoned us to hold up production as "there was a nigger in the wood pile," and two days later, sometime in March, Schmitt said that "they were receiving so many complaints about the Walgreen Company using water in their malted milk that it was affecting their business and that they would not install any more machines until they had an opportunity to investigate the seriousness" of the matter; that when the first order to manufacture 300 machines was given Arnold Co. was instructed "to rush delivery," and when the stop order was given, "slightly over 200" had been manufactured and delivered and there were "75 machines ready to go that particular day, if they followed us up, and we had already started on the additional quantity of 300 more. We purchased material for the thousand on many parts that we couldn't buy in small quantities;" that the witness had conversations with Schmitt and Knight, in the middle of 1930, "relative to the amount of costs expended in the manufacture of the No. 21 Walgreen Dispenser," in one of which he handed to Schmitt the following "summary:"

"SUMMARY
JUNE 1, 1930

| | |
|--|------------------|
| Total Cost as per attached | 9,695.89 |
| Burden 1.20% of \$3885.98 Experimental Labor | 4,663.17 |
| Direct Labor to date | 963.88 |
| Burden Direct Labor to date | 1,156.66 |
| Cost of Bases not included in above | 600.00 |
| " " Monel Tubes | 153.00 |
| " " Copper Cylinder | 500.00 |
| " " #20 Dispenser Parts | 972.00 |
| " " #20 Labor | 150.00 |
| Burden on #20 Labor 1.20% | 180.00 |
| Additional Labor Estimate | 1,000.00 |
| " Burden " | 1,250.00 |
| | <u>21,284.60</u> |
| Cost of Patents (estimated) | 1,500.00 |
| | <u>22,784.60</u> |
| | TOTAL |

Cost of Future Service ?

CHARGE TO WALGREEN COMPANY

Experimenting Tools, Dies etc.
300 #21 @ 27.50 less 2%

10,000.00
8,075.00
18,075.00

The witness further stated that he told Schmitt that the "summary" was "a statement of costs so far" and that Arnold Co. had not received any payment from defendant, and Schmitt replied that he would take the matter up with Walgreen, Sr., and in June, 1930, the witness and Schmitz talked with Knight and Walgreen, Sr.; that Schmitz stated that he wanted a payment on account, of \$12,000; that all of the figures contained in the "summary" were then discussed and "a payment was agreed upon; partial payment on account;" that "Knight said that a check would be sent the following day as partial payment on the account;" that at that meeting no one connected with defendant "made any protest of any kind as to what the figures showed," save that Knight stated that "he didn't think the Walgreen Company should be charged for burden - for factory burden; * * * 'inasmuch as the Walgreen Company have lost so much money on the proposition' he thought that we should be willing to adjust our price and not charge them for burden. That was the first objection that I ever heard from anyone connected with the Walgreen Company to the amount of our bill;" that Arnold Co. received from defendant the following letter, dated June 23, 1930:

"It will be impossible for me to work out the additional matters necessary to finish a contract between us for several days. In view, however, of our having agreed to make you an advance in the near future, we are enclosing our check for \$12,500. It is our understanding that this advance will in the meantime rate as an advance to you against the delivery of machines at \$37.50 each. Please send all billings for machines through to Mr. Fletcher, which we shall charge against the advance, rendering you a statement from time to time.

"Trust that the foregoing will take care of matters for you in the meantime."

The witness further testified that later the matter was taken out of the hands of Schmitt and all future dealings were with Knight, and at a subsequent meeting Schmitz told Knight that the charge was entirely

STATE OF NEW YORK

10,000.00
1,000.00
11,000.00

Experimental Tools, etc.
100.00

The witness further stated that he did not believe that the "summary" was "a statement of costs to him" and that Knott Co. had not received any payment from defendant, and admitted further that he could take the matter up with defendant, etc., and in June, 1930, the witness and defendant talked with Knight and defendant, etc.; that defendant stated that he wanted a payment on account, of \$2,000; that all of the figures contained in the "summary" were then discussed and "a payment was agreed upon partial payment on account"; that "Knight said that a check would be sent the following day as partial payment on the account"; that at that meeting no one connected with defendant "made any protest of any kind as to what the figures showed," save that Knight stated that "he didn't think the defendant company should be charged for burden - for factory burden; * * * inasmuch as the defendant company have lost so much money on the proposition, he thought that we should be willing to adjust our price and not charge them for burden." That was the first objection that I ever heard from anyone connected with the "defendant company" to the receipt of our bill; that Knott Co. received from defendant the following letter,

dated June 25, 1930:

"It will be impossible for me to work out the additional matter necessary to find a correct balance for Knott Co. In view, however, of our having agreed to make you an advance in the past, we are making the one check for \$2,000. It is our understanding that this advance will be the maximum rate in an advance to you against the delivery of machines at \$2,000 each. Please send all bills for machines shipped to Mr. Knott, which we will of course pay immediately, including any interest now due. This is the limit. That is the feeling with Knott Co. at this time. You in the meantime."

The witness further testified that later the matter was taken out of the hands of Knott and all future dealings were with Knott, and at a subsequent meeting Knott told Knott that the Knott Co. had

just and that "we didn't even begin to put in a lot of our expenses. That if we would have charged to this device money that we had expended in the way of labor on the part of our superintendent that the charge would be higher;" that the witness received from defendant the following letter, dated December 12, 1930:

"As per our recent conference and correspondence, I understand that the total charges for the developing and manufacturing of the three hundred combination dispensers is a total of \$24,613.00. Crediting the account with \$12,500.00, plus \$12.50 per machine for the three hundred dispensers which we are returning to you, totaling \$16,250.00, leaves a net balance of \$8,363.00 due you on this account.

"If the above figures are as you understand the proposition, and if you will verify by letter that you will credit our account with whatever income you receive over and above \$12.50 each for the three hundred machines which you are taking back for credit, and also if Walgreen Co. will be considered fifty per cent owners in the event of any future developments or sale of the combination dispensers over and above the three hundred taken back, we will be pleased to forward a check for \$8,363.00 at once for the balance of the account."

The witness further testified that in the numerous conferences that were held in respect to the bill the only objection that was made to it by anyone connected with defendant related to the item of burden; that it was agreed between Schnitt, Knight and the witness that "the machines be billed at thirty-seven and a half and ten dollars be credited toward the tool cost," upon the basis that there should be manufactured not less than 1,000 machines. Upon cross-examination the witness stated that he had requested payment of defendant on the basis of the statement ("summary"), which did not embody the entire agreement with defendant; that in the original conversation with Walgreen, Sr., the latter stated that the article was to belong to defendant.

Jorgenson testified that he saw the Flegel machine, in the presence of Fletcher, Walgreen, Jr., and Blish, about June 15, and Walgreen, Jr., said that "the machine wasn't what they wanted;" that it would not do, as the machine made it too obvious that they were putting water into the milk and they might just as well use a faucet

Just and that "we didn't even begin to see in a lot of our responses."

That is, we would have argued to this point only that we had

expended in the way of labor on the part of our soldiers. 1871

that the change would be slight; that the witness had been

3. The following report, dated 12/15/54, is being submitted:

to you, resulting in a net increase of \$4,863.00 for the remaining four months of the three month agreement which is the remaining \$4,863.00. Including the amount of \$15,500.00, plus \$12.50 the ending of the three month commitment agreement is a total of \$15,512.50. The total change in the developing and manufacturing and engineering and construction, I

77 The above figures are as per statement and the
reposition, and if you will kindly by letter on 11th or 12th
your account for 1917 income, you will have over 12.00
for the three months which you are - which back for
- still, and if it is correct, it will be credited to your
- in the event of any future payments or sale of the
- position disappears over and above the three months term
back, it will be given to you - of \$100.00 or over
for the balance of the account."

There is no further action in the numerous conferences.

at held in fact as well as law will be only one of them.

(S)

to be anyone connected with the list of names

... ..

... he still is at thirty-seven and a half and ten years old

limited to one roof cover, upon the fact that it is

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

he witness stated that he had reported the same to the

State of the Government ("U.S.A.")

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

. 706-28

1941. 1942. 1943. 1944. 1945. 1946. 1947. 1948. 1949. 1950. 1951. 1952. 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581. 2582. 2583. 2584. 2585. 2586. 2587. 2588. 2589. 2590. 2591. 2592. 2593. 2594. 2595. 2596. 2597. 2598. 2599. 2600. 2601. 2602. 2603. 2604. 2605. 2606. 2607. 2608. 2609. 2610. 2611. 2612. 2613. 2614. 2615. 2616. 2617. 2618. 2619. 2620. 2621. 2622. 26

[illegible]

Alfred, Jr., said that "the machine was" in fact "broken."

... ..

SECRET

on the fountain as that machine; that the witness said that he had an idea as to a machine which he thought could be worked out to suit defendant's purposes and he explained his idea, which was a radical departure from the Flegel design, which "was just a cup and with the malted milk dispenser set at the side of it, the water was turned on in the faucet and run into this cup until it was full. After that the container was placed underneath the receptacle which had the water and the lever was pressed and dropped the water in the cup, and then placed under the malted milk dispenser, or the milk powder dispenser and a shot of powder was put into this here container. Now, in my design of the machine which I proposed there wouldn't be any of these operations at all. It would all be synchronized into one operation, * * * pulling a lever which would automatically turn on the water and automatically close it up;" that Fletcher said the design was a good one and would work out, and Walgreen, Jr., told the witness to go ahead and make up a sample right away; that the witness, upon orders from Blish, started work on the machine, "made sketches and supervised the making of it, * * * had patterns made and got castings and machined them up, and had worked them into a finished model," and had the design for the measuring device finished about July 15, 1929, and when he showed Schmitt how the design operated the latter said that it looked very well and inquired how long it would take to make a complete model, to which the witness replied, "Within two weeks," and Schmitt said "they were very anxious to have a finished model so they could install it in their store at Bowen avenue, because the officials of the Walgreen Company had lunch there and they could watch the operation of the machine;" that the device then shown Schmitt "was in a horizontal position," but it became necessary to get the machine into a smaller space and it was then "built in a vertical position;" that they completed the vertical machine in about a week, during which time there were telephone calls from

on the machine as it was running; that the witness said that he had seen them as to a machine which he thought could be worked and so said that the witness's purpose and he said that his name, which was a technical name for the machine, which was "the first design," which was that a copy and with the machine with him at the time of it, the witness was turned on in the house and run into this cup until it was full. After that the container was placed under the pump handle which had the water and the lever was pressed and dropped the water in the cup, and then placed under the raised milk dispenser, or the milk powder dispenser and a shot of powder was put into the hot container. Now, in my design of the machine which I proposed there would be any of these operations at all. It would all be synchronized into one operation, * * * pulling a lever which would automatically turn on the motor and automatically close it up." That witness said the design was a good one and would work out, and Waigman, Jr., said the design was a good one and would work up a sample right away; that the witness, upon return from Berlin, started work on the machine, "and whether and supervised the making of it, * * * had gotten used and got castings and machines then up, and had worked them into a finished model," and had the working device finished about July 16, 1947, and when he showed it to the witness how the design operated the latter said that it looked very well and indicated how long it would take to make a complete model, he asked the witness replied, "within two weeks," and witness said they were very anxious to have a finished model as early as possible in that place of home owned, because the officials of the district attorney had lunch there and they could see the operation of the machine, that the witness then shown witness was in a hospital condition, but it became necessary to get the machine into a smaller space and it was then built in a vertical position, but they continued the vertical motion in

Walgreen, Jr., inquiring when the model would be finished, to which the witness replied, "On July 15." The witness then testified, corroborative of the testimony of Blish, as to what occurred upon that date, when Fletcher and Walgreen, Jr., came to Racine. The witness further testified that Walgreen, Jr., decided that the machine "would have to be eased up in order to have a woman operator operate" it, and the desired change was made; that from the date the witness started upon a design until then, he had devoted his entire time to the machine; that on July 22 the machine was brought to Chicago and the witness, Schmitt, Fletcher and Walgreen, Jr., took it to the store on Bowen avenue, where it was installed and operated, and drinks were served to defendant's officials; that Walgreen, Jr., then mixed drinks and served them to customers; that the party then went to defendant's office, where Walgreen, Sr., asked them what they thought of the machine, and they said it was all right, and Walgreen Sr., then ordered the witness to make up six more machines; that after the order was placed it was necessary to have wooden patterns made, which were utilized to make the master patterns, and the latter were used to make the regular patterns; that when, in September, one machine was finished, the witness and Blish showed it to Schmitt, Fletcher and Walgreen, Jr., after which it was taken to the Bowen avenue store and installed and operated there, whereupon Walgreen, Jr., said: "Well, that is something along the line we had in mind and it works perfect;" and Fletcher said, "This is a good job. It is a real machine;" that they then said they were very anxious to get the five other machines, and after the same had been completed, around October 1, they were installed at defendant's State and Randolph streets store, and after some defects had been corrected the machines were operated and found to "work O.K.," and Walgreen, Jr., stated that he was satisfied that they could be used in the sale of the drink;

that while instructions were being given to the store operators of the machines they asked Walgreen, Jr., "what they should say if people asked them what they were putting in the drink, and he told them to say nothing, to give them evasive answers;" that the amount of liquid originally dispensed by the machine was six ounces, which was changed to five, by order of defendant, and later "the Walgreen Company wanted to use carbonated water in the machines," instead of "plain water right off the water faucet," and defendant shipped a carbonator to Arnold Co., but it would not work on the machine because the cylinder was in a vertical position and it was impossible to use it that way, and it became necessary for the witness to redesign the machine and it was not until January 6, 1930, that the redesigned machine was ready, when it was installed in Chicago; that the materials used for the old design could not be used for the new, and it was necessary to use new materials, including "Monel" material, "a stainless metal;" that at the installation of the new machine Walgreen, Jr., Fletcher and the witness operated the machine and "some drinks were made up," and Walgreen, Jr., said, "This is a better drink than the plain water;" that the witness was thereupon instructed by his company to make up tools, patterns, dies and the small parts for 1,000 dispensers, and between March 1 and 15 they were all practically finished, and a week later, after the witness had sent five machines to defendant, the latter requested him to change the measuring device so that a greater amount of powder would be dispensed; that this change involved new molds and new dies; that the witness then commenced to deliver ten or twelve machines at a time, "devoting all his time to the work;" that in the latter part of April defendant telephoned him the machines were not dispensing the proper amount of water, and the witness, after examining the installations, told Walgreen, Sr., that the

that while instructions were being given as to how to operate
of the machine they should be given, i.e., that they should say
it people would say that they were building in the bank, and he
told them to say nothing, to give them every answer; and the
amount of it was originally designed by the machine was six copies,
which was changed to five, by order of defendant, and later "the
Algonquin Company wanted to use copyrighted paper in the machine,"
instead of "plain paper right off the water faucet," and defendant
changed a computer to make it so, but it would not work on the
machine because the cylinder was in a vertical position and it was
impossible to use it that way, and it became necessary for the dis-
cuss to redesign the machine and it was not until January 2, 1930,
that the redesigned machine was ready, then it was installed in
Chicago; that the certificate was for the design could not be
used for the new, and it was necessary to use new materials, in-
cluding "steel" material, "a stainless metal," that at the installa-
tion of the new machine "Algonquin, Inc., Jackson and the witness
operated the machine and "some things were made up," and defendant,
Dr., said, "This is a better thing than the plain water," that the
witness was subpoenaed by his company to make up tools,
patterns, dies and the small parts for 1,000 dispensers, and between
May 1 and 15 they were all practically finished, and a week
later, after the witness had sent five machines to defendant, the
latter requested him to change the measuring device so that a greater
amount of powder would be dispensed; that this change involved new
tools and new dies; that the witness then undertook to deliver ten
or twelve machines in a time, "devoting all his time to the work";
that in the latter part of April defendant telephoned him the machine
were not dispensing the proper amount of powder, and the witness,
after examining the installation, told defendant, Dr., that the

trouble was due to the fact that the pipes had been laid through warm, hot places, which caused the gas to become parted from the water and the gas "got up ahead," whereupon Walgreen, Sr., turned to his engineer and said, "This condition will have to be remedied," to which the engineer replied, "That would be a costly installation," and Walgreen, Sr., said "that he didn't care what it cost, those machines had to work satisfactorily;" that after defendant made the proper changes the machines worked satisfactorily; that in June Fletcher telephoned him to come and instruct the supervisors of defendant "on the construction of the machine" so that if there were any complaints from the fountain men the supervisors could advise them, and the witness and an engineer demonstrated the use of the machine to the supervisors and went around to the various places and found that the machines were working satisfactorily; that Arnold Co. continued to manufacture the machines and the witness devoted his entire time to the work; that in the middle of July, 1930, Schmitt said to the witness, "Rush through another lot of three hundred machines, and I said that I would;" that about a week afterward Schmitt telephoned him to "stop the manufacture of any more of our machines that you are making for us," that they were running into difficulty in the sale of malted milks made by the machines, and the witness thereupon did as ordered; that at this time they had just completed 300 machines; that it was necessary to "junk" the patterns and tools used for the "plain water" machine.

Such parts of the testimony of George C. Schmitz, president and general manager of Arnold Co., as merely corroborate the testimony of Blish and Jorgenson, need not be stated. In addition to such parts, the witness testified that Fletcher requested him to hurry up the deliveries of the machines, and that "it will take about a thousand

trouble was due to the fact that the pipes had been laid through
 walls, not through the floor, which caused the gas to become trapped in the
 water and the gas "got up there", according to Brown, Jr., turned
 to his engineer and said, "this condition will have to be remedied,"
 to which the engineer replied, "that would be a costly installation,"
 and Johnson, Jr., said "that no one's going to pay for it, and
 Johnson had to work satisfactorily," and after Johnson made the
 proper changes the machine worked satisfactorily; that in June
 Fletcher called him to work and instructed the engineers of
 Johnson "on the construction of the machine" so that if there
 were any problems from the machine was the engineers could
 advise him, and the witness and an engineer demonstrated the use of
 the machine to the supervisors and sent them to the various places
 and found that the machine was working satisfactorily; that recall
 Col. Johnson, a manufacturer of machines and the witness devoted
 his entire time to the work until in the middle of July, 1930, when
 sent to the witness, through another lot of three hundred
 machines, and that is what I said; that about a week later
 received a letter from the "for the manufacture of any kind of car
 machine that you are working for me," that they were making three
 differently in the sale of engines like made by the machine, and the
 witness thereupon did an order; that at this time they had just
 completed the machine; that it was necessary to "junk" the machine
 and tools used for the "plain water" machines.
 Each part of the testimony of George O. Brown, President
 and General Manager of Brown Co., is equally corroborated by the testimony
 of Walsh and Johnson, need not be stated. In addition to each
 part, the witness testified that Johnson requested him to make up
 the delivery of the machines, and that "it will take about a month"

machines to equip our stores. You have shipping instructions on the first three hundred and we will give you further shipping instructions in ample time to keep them coming as we need them, but you must keep them coming;" that about April 15 Schmitt told the witness that the machines were proving satisfactory and of economic worth, that "they save us about one and a half cent on materials on each drink, and in addition to that we get away from a lot of trouble and expense in handling the fresh milk and in keeping it sanitary and up to the Board of Health requirements." Q. What did you say?

A. I says, 'Well, the machines prove very valuable to you, don't they?' And he says, 'Yes.' I said, 'Are you going right ahead and install them in all the stores?' He says, 'Yes, we are going ahead and it will take about a thousand machines.' He says, 'However, don't make them any faster than what we can get them installed or as we need them to get them installed. Go ahead with the small parts on the other machines and the more expensive parts run through in lots of three hundred. We don't want any more money invested on this proposition than necessary as we go along.' Q. What did you say to that? A. Well, I said, 'We have spent a very substantial amount of money on this proposition up to the present time, and we need \$12,500 to meet some of our outstanding obligations incurred because of this thing' and he says, 'Mr. Knight will take care of that.' I says, 'The tool and die cost are preliminary expenses in making these hand built models and amount to about ten thousand dollars. How do you want us to bill that? Do you want us to charge you in our invoices for approximately ten thousand dollars covering these costs and bill the machines at twenty-seven fifty?' He says, 'Mr. Knight will let you know about that;" that Salgreen, Sr., was present during the conversation and the witness said to him, "'Are these machines proving satisfactory?' He says, 'Yes, we want to go right ahead and install them in all our stores.' 'Furthermore, Mr.

machines to equip our stores. You have this long installation on the first three hundred and we will give you further installing in attention in ample time to keep them going as we need them, but you must keep them working" that about that is what he said the witness that the machines were providing satisfactory and of economy work, that "they save us about one and a half cents on each can of condensed milk, and in addition to that we get away from a lot of trouble and expense in handling the fresh milk and in keeping it sanitary and

up to the Board of Health requirements." Q. What did you say?

A. I say, "Well, the machines are very valuable to you, don't they?" and he says, "Yes," I said, "Are you getting right ahead and installing them in all the stores?" He says, "Yes," we are going ahead and it will take about a second machine." He says, "However,

don't make them any faster than that we can get them installed or

as we need them to get them installed. Go ahead with the small

parts on the other machine and the more expensive parts run through

in lots of three hundred. A. Don't want the more money invested on

this proposition than necessary as we go along." Q. What did you

say to that? A. Well, I said, "I have spent a very substantial

amount of money on this proposition up to the present time, and we

need it, \$200 to meet some of our outstanding obligations incurred

because of this thing," and he says, "Mr. Nichols will take care of

that." I say, "The cost and the cost are really very expensive in

terms, these hand built models and amount to about ten thousand

dollars. Now to you want us to fill that? Do you want us to have

you in our invoice for approximately ten thousand dollars covering

these costs and fill the machine of twenty-seven fifty." A. Says,

"Mr. Nichols all I can know about that," that is what he said, "He

present during the conversation and the witness says to him, "He

these machines providing satisfactory," He says, "Yes, we want to go

Knight will give the agreement attention so as to get it closed up and that will also permit you to sell these machines to others. Walgreen can be very instrumental in recommending these machines and we do not want it known that the Walgreen company controls the sale of this machine and the sale of the powder. I don't think it is good policy to have that known because some of our competitors may not buy if they know about it;" that Schmitt said, "We are going to get busy in selling these machines in Denver;" that they were going to install them there after they got through installing them in Chicago; that the witness asked him "how profitable or what mechanical value the machine was," to which he answered "that they would earn their cost in a remarkably short time * * * ten days or two weeks * * * in the busy stores;" that after Walgreen, Sr., left, Knight, the comptroller of defendant, came into the room and the witness said to him: "Mr. Walgreen just told me a short while ago you are going to see to it that I get a check for \$12,500," to which he replied, "I will take care of that;" that the witness then said: "How do you want the bill made out? Do you want us to bill you with this ten thousand dollars preliminary expenses and the machines at twenty-seven fifty?" to which he replied: "No, you see we furnish these machines to our individual stores and we have to charge them up with this equipment, this installation, and we can't charge them with tools, dies. We will pay you for these tools and dies at the rate of ten dollars a machine for the first thousand machines we want for our stores;" that the witness then said: "Well, I understand then that you want the first thousand billed at thirty-seven fifty; after that the price is going to be twenty-seven fifty." He says, 'O.K.;" that the witness said to Knight: "Don't forget about that \$12,500. We need it very bad. We have got obligations that we incurred on your behalf on this thing, and we need that money;" to which Knight

replied, "Well, I will take care of that," but that it was about two months later that they finally received the \$12,500, at which time Arnold Co. had shipped defendant 137 machines, which, at \$37.50 a piece, would amount to \$5,137.50; that the invoices on the 137 machines were "memorandum invoices" and did not specify any price, but that after the receipt of the \$12,500 "we billed them at thirty-seven fifty including the machines that had been shipped prior to the date when we got the check;" that about August 1, after receiving notice that defendant had ordered them to stop making the machines, he saw Schmitt and said to him, "What happened in the dispenser proposition?" And he says, 'Well, everything went along fine with the machines installed in the loop but when we got them in the outlying neighborhood stores we got just endless complaints from our customers out there.' I said, 'How did that come about?' He says, 'It seemed the union milk drivers started a propaganda about Walgreen using water instead of fresh milk in the preparation of malted milk and naturally our competitors got hold of this and they were not slow in peddling it around.' He says, 'The complaints became so serious we had to discontinue using the machines;' that about October 15 the witness had the following conversation with Schmitt: "I said, 'What have you decided to do about the dispenser?' 'Well,' he says, 'the situation is so serious we have decided definitely to drop it.' * * * I says, 'Well, in that case we will forget about the order of a thousand machines and we will bill you only with our cost and expenditures, actual cost and expenditures.' After thinking it over a short while Schmitt said, 'Well, that is all right. What do the figures show?' And I gave him the statement showing what the figures amounted to. And then he said 'Well, how about this burden item in here?' 'Well,' I says, 'you can't do that' or 'nobody can do business without taking off burden and that is certainly a charge that is justified. That is our actual cost especially in view of the fact that Jorgenson and

Peters and Hein's time is all in the burden. If we don't get reimbursed for burden, why, we are out, not to say anything about heat, light, power and everything else that had to be figured in burden.' Q. Did he say anything else? A. He come back with a proposition and said, 'Well, how about taking these three hundred machines back and giving us credit for them. You can sell them for use as an ordinary dispenser.' * * * A. I said, 'No, I would not take these dispensers back. They look entirely different than our regular dispensers. * * *'" The witness further testified that Arnold Co. did not take back the machines that had been delivered to defendant and that they still had possession of the machines that had been made up but not delivered when defendant dropped the proposition; that these machines were available to defendant; that the witness had notified defendant to take these machines away but that the latter had ignored the notice. In connection with the testimony of this witness the following letters were offered and received:

"October 29, 1930

"Mr. Roland Schmitt
"c/o Walgreen Company,
" * * *
"Dear Mr. Schmitt:

"Reference our recent personal interview. It may be desirable for you to have a written confirmation regarding the figures I left with you (Total \$24,613.41) covering the actual cost of the combination dispensers we made for you. Therefore, we hereby give you positive assurance that the figures are taken from accurately kept records and are correct. We will be glad to have you check up on any of the material and other costs. The daily entries covering labor charges are also open for your audit.

"* * *

"We are in urgent need of the funds we expended on the proposition in your behalf, and we will certainly appreciate if you can help us out by complying with the following suggestion.

"After giving you credit for the \$12,500.00 already paid on account there is a balance of \$12,113.41. We will greatly appreciate a remittance for \$9,000.00, which will leave a balance of \$3,113.41 due us, or the approximate value of three hundred of the combination dispensers valued at \$11.50 (Our No. 20 Dispenser cost to you).

The witness testified that he had been delivered three machines that had been delivered to him by the defendant. He said that he had possession of the machines at the time they were delivered to him and that he had dropped them off at the defendant's place. The witness also testified that the defendant was available to deliver the machines to him at the time they were delivered. The witness further testified that the defendant had notified him to take the machines away but that the latter had ignored the notice. In connection with the testimony of this witness the following letters were offered and

3-3-1A

"L'Espresso", 21, 1920

* Mr. Tolson
 * Mr. E. A. Tamm
 * Mr. Clegg
 * Mr. Glavin
 * Mr. Ladd
 * Mr. Nichols
 * Mr. Rosen
 * Mr. Tracy
 * Mr. Carson
 * Mr. Egan
 * Mr. Gurnea
 * Mr. Hendon
 * Mr. Pennington
 * Mr. Quinn
 * Mr. Nease
 * Miss Gandy

The 4th section covering labor charges are also open for your
 to have your check up on any of the material and labor charges.
 from accounts. I hope my report, as will be plain
 happy give you to have a chance that the labor charges taken
 the estimation of charges are not for you. I hope, I
 I if it is for (cost \$1.00) covering the actual cost of
 for you to have a price estimation for the labor charges
 I hope you can give me a personal interview. It may be desirable
 until.

2000

the fact that the Government is not in a position to pay the interest on the foreign debt, and that the Government is not in a position to pay the interest on the foreign debt, and that the Government is not in a position to pay the interest on the foreign debt.

[illegible]

This amount can stand as a balance due us on account until such time as we can decide regarding accepting the combination dispensers on hand and the amount we can allow as a credit therefore.

"Hoping for a favorable reply and that it will be possible for you to let us have the \$9,000 as requested, with best wishes, we are

"Yours truly,
"ARNOLD ELECTRIC COMPANY
"(signed) George C. Schmitz
Pres."

"November 15, 1930

"Mr. Roland Schmitt,
"c/o Walgreen Company,

"Dear Mr. Schmitt:

"We went ahead with the work on the Combination Dispenser with the positive assurance that we would not suffer a loss. The figures presented do not cover our actual cost, and therefore we feel justified in expecting a settlement on the basis suggested in my letter of October 29th, 1930."

"It is very important that we receive a remittance to apply on account. The loan I told you about due on November 10th was extended with a promise to pay the bank \$9,000.00 just as soon as we received same from you. Please, therefore, let us have your remittance so we can make good on our promise. The reason we owe the bank is because of expenditures in your behalf. Thanking you in advance for your favor, we are

"Yours very truly,
"ARNOLD ELECTRIC COMPANY.
"(signed) George C. Schmitz
Pres."

"(Italics ours.)

"November 28, 1930

"Mr. Roland Schmitt,
"c/o Walgreen Company,
"744 Bowen Ave.,
"Chicago, Illinois.

"Dear Mr. Schmitt:

"It really seems that it should not be necessary for me to call again and carry on lengthy discussion. We certainly cannot and will not take more loss on the combination dispenser proposition than we already suffer because of it.

"It does not seem fair to ask us to take a further loss because of terms considered and discussed in connection with an agreement that was never consummated, especially when entirely different conditions than shelving the entire proposition were contemplated under that agreement.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

THE NATIONAL ARCHIVES
COLLEGE PARK, MARYLAND 20740

SECRET

06-11-2017

[illegible]

6. 1. 1974

22

[illegible]

The first of these is the fact that the
 second of these is the fact that the
 third of these is the fact that the
 fourth of these is the fact that the
 fifth of these is the fact that the
 sixth of these is the fact that the
 seventh of these is the fact that the
 eighth of these is the fact that the
 ninth of these is the fact that the
 tenth of these is the fact that the

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them.

(... 2011)

DATE: 20090907

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the
4. fourth of these is the fact that the
5. fifth of these is the fact that the

3111. 1. 2. 3. 4.

100

[illegible][illegible]

"We are sure that Mr. C. E. Valgreen, Sr. will O. K. your sending an early remittance of the balance due us, considering that our charges do not cover our actual cost.

"The figures submitted show our expenditures for material, labor and so forth, but certainly do not cover our overhead cost. If the time that Mr. Jorgenson spent on the proposition had been charged up on an hourly basis, it alone would amount to more than our whole charge to cover our overhead expenses.

** * *

"Yours truly,
"ARNOLD ELECTRIC COMPANY.

"G. C. Schmitz"

Plaintiff's witness Raymond Myer, a public accountant, testified to an audit of the account of defendant as shown by the records and books of Arnold Co. and in connection with his testimony two statements were introduced, one showing the labor charged to the account of defendant and one showing the materials charged. The witness also gave testimony relating to certain items of factory burden which he stated were properly chargeable to defendant. Schmitz, called for further examination, testified, in substance, that the sum of \$27,674.75 was a fair and reasonable value of the manufacturing service performed by Arnold Co. for defendant; that Arnold Co. received \$12,500 from defendant and that the amount still due that company, exclusive of interest, was \$14,574.75; that the machines that were manufactured for defendant and not delivered and the materials that had been allocated to the manufacturing of the dispenser were still in the Arnold factory building, where they were segregated on the second floor; that materials on hand could not be used for any other machine that Arnold Co. manufactured and that he did not know of any other manufacturer that could use the material; that the parts charged against defendant are "machined up" and are worth nothing but scrap, as they were adaptable only for use in the "21 dispenser." "For one thing there is monel tubing. That is very expensive metal. It has a regular market price as junk. * * * There are quite a few stampings and small parts that were made * * * for

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a message of condolence to the people of the State of California, who have been afflicted by a severe drought and famine. The President expresses his sympathy for the suffering people and offers them his best wishes for a speedy recovery.

"The first thing I noticed when I stepped out of the car was the heat. It was a relief, but I was also a bit nervous. I had heard that the weather was terrible, but I was not sure what to expect. The first thing I noticed when I stepped out of the car was the heat. It was a relief, but I was also a bit nervous. I had heard that the weather was terrible, but I was not sure what to expect. The first thing I noticed when I stepped out of the car was the heat. It was a relief, but I was also a bit nervous. I had heard that the weather was terrible, but I was not sure what to expect."

RECEIVED
JAN 10 1964

* x j i g n i t e m . * 3 . 0 *

...the

[illegible]

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO PRESS

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 08-11-2010 BY 60322 UCBAW

...the ... of ...

[illegible]

1000

THE UNIVERSITY OF CHICAGO

Journal of Management Studies, 19(1), 67-80.

[illegible]

Journal of Interpersonal Violence 28(10) 2013-2014

has been found in the text of the 1950-1951 report, and in the

100. The following are the names of the persons who have been appointed to the various positions in the organization of the American Society of International Law:

SECRET

DOI: 10.1002/for

Unlabeled 100- μ m square soft-foam slabs were placed in each test cell.

and the "end result" are essentially the same.

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

1997-2000

© 1994 by The McGraw-Hill Companies, Inc. All rights reserved. Printed in the United States of America. This book is protected by copyright. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or by any information storage and retrieval system, without permission in writing from The McGraw-Hill Companies, Inc.

one thousand machines. There are some screws that can be used for other purposes because they are standard, but there are few of those." There was also offered, in connection with the witness's testimony, a statement of the cost of patterns, plating and miscellaneous expenses charged to the account of defendant.

Defendant offered a number of exhibits showing invoices from Arnold Co. to defendant, in which machines shipped were billed at \$37.50. It also introduced several letters, which we do not consider necessary to set out.

It is clear that Walgreen, Sr., dictated the simple terms of the oral agreement that was made between the parties. At the first meeting of Walgreen, Sr., and Blish, the former, after first stating that defendant was anxious to have a machine made that would dispense a powdered product in water for malted milks in place of raw milk, and that it had tried out a certain powdered product which he thought would make a satisfactory malted milk, but that "he didn't know whether the article offered any merit or not," said, in substance, that if Arnold Co. would design, or attempt to design, a machine that would dispense a powdered product in water for malted milks in place of raw milk, and if his "idea" proved to be a "flop," "they would pay all expenses involved." After stating that he thought that the parties should have a written agreement, Blish finally told Walgreen, Sr., that Arnold Co. "would be glad to work with him on that basis." In discussing the agreement defendant has seen fit to refer to certain paragraphs that are found in proposed agreements that it refused to sign, but in determining what was the agreement, we have disregarded, of course, these proposed provisions.

From the beginning of the business relationship between the parties, Arnold Co. made a number of unsuccessful efforts to have a written agreement executed, but Walgreen, Sr., was not satis-

one hundred dollars. There are some papers that can be used for other purposes because they are identical, but there are two of them. There are also others, in connection with the witness's testimony, a statement of the cost of production, packing and shipping expenses charged to the account of defendant.

Defendant offered a number of exhibits showing invoices from Arnold Co. to defendant, in which machines shipped were billed at \$17.50. It also introduced several letters, which we do not consider necessary to read out.

It is shown that defendant, et al., directed the single turns of the trial agreement that was made between the parties. At the time of defendant, et al., and Arnold Co. the terms, after first stating that defendant was seeking to have a machine made that would produce a powdered product in water for mixed milk in place of raw milk, and that it had tried and a certain powdered product which he thought would make a better, very mixed milk, but that he didn't know whether the article created any milk or not," said, in substance, that Arnold Co. would design, or attempt to design, a machine that would produce a powdered product in water for mixed milk in place of raw milk, and if it "then" proved to be "okay," "they" would pay all expenses involved. After stating that he thought that the parties should have a written agreement, Blain finally told witness, et al., that Arnold Co. would be glad to work with him on that basis.

In discussing the agreement defendant has been up to date in main paragraphs that are found in proposed agreement that is referred to him, but in conversation with the witness, he has also excluded, of course, those proposed provisions.

From the beginning of the business relationship between the parties, Arnold Co. had a number of confidential informants to have a written agreement executed, but defendant, et al., was not willing

fied that his "idea" might not prove a "flop," and he refused to sign an agreement until he was assured of the success of his "idea," which was to make "malted milk" drinks in defendant's 400 drug stores out of a "powdered product" - owned by it - and water, and to sell the drink to the public as genuine malted milk. He figured that if his "idea" proved a success defendant would save one and one-half cents on every glass sold. He realized, however, that it was essential to the success of his "idea" that defendant have a machine that would conceal from the purchaser the real nature and contents of the drink sold. He estimated that such a machine would earn its cost in ten days or two weeks, and that if the "idea" proved a success defendant would own the machine and have the right to sell it to competitors and others, and "that the Arnold Electric Company could be the sole manufacturer of it." The final machine constructed by Arnold Co. was a mechanical success and highly satisfactory to defendant, but the "idea" of Walgreen, Sr., proved a failure because milk drivers and business rivals started propaganda about the nature of the malted drinks sold by defendant and as a result of the propaganda the complaints of defendant's customers "became endless," and its business was so seriously affected that it was forced to abandon the "idea" and to cease using the dispensers, and it so notified Arnold Co.

Defendant contends that plaintiff's claim sounds in damages and is not sustainable under the common counts. It is a sufficient answer to this contention to say that the claim is not based upon the theory of damages for breach of a contract. Plaintiff admits that defendant, when it came to the conclusion that the "idea" was a "flop," had a right, under the agreement, to order Arnold Co. to stop manufacturing the dispensers, and he sues to recover the cost, or, in other words, the expense, of the experimental work upon the machine;

... that the "idea" might not have been a "claim," and the evidence to
... an agreement with him was one of the reasons of his "idea,"
... which was to make "maize milk" which in 1900 was
... store out of a "peas and butter" - owned by it - and after, and
... to sell the milk to the public as genuine milk. He learned
... that if his "idea" proved a success, he would have the milk
... one-half cent an ounce, and the other half cent, but it
... was essential to the success of his "idea" that he should have a
... machine that could convert from the quantity the real nature and
... contents of the milk sold. He estimated that such a machine could
... cost 100,000 in ten days or two weeks, and that if the "idea"
... proved a success, he would not only have the machine but have the right
... to sell it to corporations and others, and "that the United States
... Company would be the sole manufacturer of it." The final machine
... constructed by Arnold Co. was a mechanical success and highly
... adapted to the business, but the "idea" of Arnold, Jr., proved
... a failure because the machine and business were not started pro-
... perly, and the nature of the milk sold by the machine
... and as a result of the propaganda the company of Arnold's
... statement "business failed," and the business was not
... effected that it was forced to abandon the "idea" and to cease using
... the company, and it is no longer Arnold's.

... statement contains that Arnold's claim is a claim in business
... and is not maintainable under the common law. It is a claim
... answer to this question to say that the claim is not based upon the
... theory of the law for the purpose of a contract. Arnold's claim is that
... defendant, when it came to the conclusion that the "idea" was a "claim,"
... had a right, under the agreement, to sell the milk for as long time
... factoring the agreement, and he goes to recover the cost of, or, in
... other words, the payment of the expenses of work upon the machine.

also the cost of manufacturing the delivered machines and the machines ordered and manufactured, wholly or in part, but not delivered. When defendant abandoned the "idea" of Walgreen, Sr., and told Arnold Co. to stop manufacturing the machines, all that then remained to be done was for defendant to pay Arnold Co. "all the expenses involved, "less \$12,500 that it had theretofore paid on account. Under such a state of facts the common counts lie, and we are satisfied that the evidence supports the finding of the trial court. Neither in the trial court nor here has any question of variance between the bill of particulars and the proof been raised.

Defendant contends that "the only evidence in the record is the actual costs to the Arnold Co. These costs include not only labor expended and material consumed, but as well the inventory still on hand, which furnishes no evidence whatsoever of reasonable market value of anything received and unjustly detained by the defendant." If we assume that it was necessary for Arnold Co. to introduce proof touching the reasonableness of the costs, we still would hold that there is no merit in the instant contention. Schmitz testified that the \$27,074.75, against which the \$12,500 was paid by defendant, "is a fair and reasonable value for the manufacturing service performed by Arnold Company for Walgreen Co." Defendant made no objection to this testimony nor did it introduce any evidence to contradict it.

Defendant contends that "the attitude of the Arnold Co. with respect to the patents is utterly inconsistent with any right to recover in this action." We have endeavored to follow the strained argument of defendant in support of this contention. Even during the time that Arnold Co. was delivering and manufacturing the machines it experienced great difficulty in securing any payment from defendant, and after the failure of the "idea" repeated efforts to collect were unsuccessful. In letters and conversations Arnold Co. stated to

also the cost of manufacturing the delivered machines and the
machines were not delivered, wholly or in part, but not
delivered. The defendant has shown the "fact" of delivery, etc.,
and told the jury to look at the evidence, all that
then remains to be done is for the defendant to pay the bill, "all
the expenses involved," Item 12, \$500 that is had therefor paid
on account. Under such a state of facts the common sense is,
and we are satisfied that the evidence supports the finding of the
trial court. Nothing in the trial court nor has any question
of variance between the bill of Gustafson and the proof been raised.

Defendant contends that "the only evidence in the record
in the actual costs to the Arnold Co. These costs include not only
labor expended and material consumed, but as well the inventory still
on hand, which furnishes no evidence whatever of reasonable market
value of anything received and rightly retained by the defendant."
It is assumed that it was necessary for Arnold Co. to introduce proof
showing the reasonableness of the costs, as will be held that
there is no merit in the instant contention. Exhibit established that
the \$27,004.45, against which the \$1,500 was paid by defendant, is
a fair and reasonable value for the manufacturing services performed
by Arnold Company for defendant. Defendant made no objection to
this testimony nor did it introduce any evidence to controvert it.
Defendant admits that the attitude of the Arnold Co.
with respect to the balance is clearly inconsistent with any right to
recover in this action. The facts are as follows: The defendant
argument of defendant in support of this contention. From finding
the time the Arnold Co. was delivering and manufacturing the machines
it appeared that difficulty in securing any payment from defendant
and, after the failure of the "fact" reported of order to collect
were unsuccessful. In letters and conversations Arnold Co. stated to

defendant its financial difficulties and practically begged a payment of the account, in whole or in part. It appears from the testimony of Schmitz that in March, 1931, approximately nine months after the abandonment of the "idea," he called on Schmitt and endeavored to collect the amount due plaintiff; that at the end of the conversation that took place Schmitt said: "Well, how about the patent?" I said, 'I don't believe the Walgreen Company own these patents. They are not the property of the Walgreen Company.' He says, 'Well, if we pay this account here we want the patents.' I said 'Well, I don't know whether I can get those patents for you or not.' I said, 'We have assigned our rights to those patents to the Hamilton-Beach Manufacturing Company.' He said, 'Well, you are just out of luck if you can't get those patents for me and expect us to pay this account. We won't pay it unless we have the patents.'

* * * Q. Did you subsequently get the patent? A. I did. Q. Did you offer it to Mr. Schmitt? A. I offered it to him (the latter part of July, 1931) on condition that he pay the account." At this point in the testimony of the witness he offered to execute an assignment of the patents to defendant if the latter would pay the account, and a formal tender of the patents to defendant, on the said condition, was then made. There being no response from defendant as to the tender, plaintiff, upon order of the court, handed to the clerk of the court an assignment from Schmitz to defendant company. As a result of the propaganda against defendant it definitely decided to abandon all use of the dispensers, and it is a reasonable conclusion from the evidence that it did not care to be thereafter known as the owner of the patents or the machine. As a matter of fact there was no agreement that defendant was to be the owner of the patents. Under the law Arnold Co., the inventor of the machine, had the sole right to take out a patent on the same. We have no right,

[illegible]

of course, to consider the proposed agreements, as they were not executed, but we may state that defendant has seen fit to call our attention to the fact that in these proposed agreements it was provided that Arnold Co. was to be the owner of all patents taken out upon the machine. It will be noted that in this last conversation between Schmitz and Schmitt, the latter, assuming that the patents had passed beyond the control of Arnold Co., admitted, by implication at least, that the account would be paid if Schmitz turned the patents over to defendant.

We find no merit in defendant's contention that "the assignment from the Arnold Co. to the plaintiff is insufficient to sustain a recovery by the plaintiff."

Defendant further contends that even if the assignment was sufficient, "plaintiff is precluded from a recovery because it does not appear that he either has possession of or any interest in the equipment and materials which the Arnold Co. had on hand when it discontinued work and for the cost of which the judgment below charges the defendant." We take it that what defendant really means to contend is that there should be deducted from the judgment the reasonable value of the equipment and materials which Arnold Co. had on hand when it discontinued work. The evidence shows that the said materials and equipment could not be used for any other machine by Arnold Co. or any other manufacturer. On March 20, 1931, Arnold Co. notified defendant that "the tools, dies, fixtures, finished machines, parts, etc., are your property," and that they are on hand at the Arnold Co.'s factory and "available to defendant." Defendant took no steps to secure the property, and from its entire attitude as to the machine after the failure of the "idea," it would seem clear that it did not want it. Arnold Co. considered it junk and defendant seems to have entertained a like view.

of course, to consider the proposed assignment, as they were not
 assigned, but we only think that defendant has been ill in call on
 attention to the fact that in some proposed assignments it was
 provided that should be. we do not know of all parties taken
 out upon the machines. It will be noted that in this last over-
 action between plaintiff and defendant, the latter, assuming that the
 parties had passed beyond the control of article 10, admitted, by
 implication at least, that the account would be paid in defendant's
 hand the balance over to defendant.

It is not in defendant's contention that "the

assignment from the article 10, to the plaintiff is invalid

to maintain a recovery by the plaintiff."

Defendant further contends that even if the assignment

was valid, "plaintiff is precluded from a recovery because it

does not appear that he either has possession of or any interest in

the equipment and materials which the article 10 had on hand when

it discontinued work and for the rest of which the judgment below

charges the defendant." We say it that that defendant really

means to contend is that there should be deducted from the judgment

the reasonable value of the equipment and materials which article 10

had on hand when it discontinued work. This contention shows that the

paid materials and equipment could not be used for any other machine

by article 10, or any other manufacturing. On March 30, 1931, article

10 notified defendant that "the article, first, second, third

machine, piece, etc., are your property," and that they are on hand

at the article 10's factory and "available to defendant." Defendant

took no steps to secure the property, and from the article 10's

as to the machine after the failure of the "idea," it would seem

clear that it did not want it. Article 10, considered in turn and

defendant seems to have entertained a like view.

Defendant contends that "there was no evidence of unreasonable or vexatious delay" and that therefore "the inclusion of interest in the judgment was wholly unjustifiable." After a careful examination of the evidence bearing upon the instant contention we are satisfied that the trial court was justified in allowing interest.

The judgment of the Circuit court of Cook county is a just one and it should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Sullivan, J., concur.

37271

14 11
277 I.A. 611²

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHN S. BUSCH (Petitioner),
Defendant in Error,

v.

ALEX RIVLIN, WILLIAM KOHEN, LINA
S. SINGER, MARTHA WABINOVITZ and
FLORENCE ARIEU,
Respondents.

ERROR TO COUNTY
COURT OF COOK COUNTY.

LINA SINGER,
Plaintiff in Error.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with case
No. 37266, People of the State of Illinois ex rel. John S. Busch
v. Rivlin et al., in which we have this day filed an opinion and
in which the pleadings and material facts involved in the instant
case are stated, and we have in that opinion set forth our con-
clusions touching the matters involved in the writ of error in the
instant case, and for the reasons there stated the judgment of the
County court of Cook county in the instant case (No. 37271) is
affirmed.

AFFIRMED.

Gridley, P. J., and Sullivan, J., concur.

2727

277 I.A. 611

PROPERTY OF THE STATE OF ILLINOIS
as set forth in the
Instruments in Error.

ALL RIGHTS, CLAIMS, DEMANDS,
AND INTERESTS, WHETHER
KNOWN OR UNKNOWN,
HEREBY FORFEITED.

ALL RIGHTS, CLAIMS, DEMANDS,
AND INTERESTS, WHETHER
KNOWN OR UNKNOWN,
HEREBY FORFEITED.

ALL RIGHTS, CLAIMS, DEMANDS, AND INTERESTS, WHETHER KNOWN OR UNKNOWN, HEREBY FORFEITED.

This case was consolidated for hearing with case

No. 2727, People of the State of Illinois vs. John A. Finch

v. Division of Land, in which the court has rendered an opinion and

in which the findings and material facts involved in the issues

are set forth, and in which the court has rendered an opinion and

findings regarding the matters involved in the writ of error in the

instant case, and the reasons therefor, and the judgment of the

court is hereby affirmed in the instant case (No. 2727) is

affirmed.

WITNESSED

Attest, 27th day of January, 1908.

37294

15 17

THE PEOPLE OF THE STATE OF
ILLINOIS ex rel. JOHN S.
RUSCH,
(Petitioner) Defendant in Error,

v.

JAMES PACENTE, JR., ROSE SCULLY
and JOSEPH COPPOLLA,
Respondents.

277 I.A. 611³

ERROR TO COUNTY

COURT OF COOK COUNTY.

JAMES PACENTE, JR.,
Plaintiff in Error.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On November 17, 1931, a petition was filed in the County court of Cook county, in the name of the People of the State of Illinois on the relation of John S. Rusch, Chief Clerk of the Board of Election Commissioners of the City of Chicago, which alleges that James Pacente, Jr., Rose Scully and Joseph Coppolla were judges of election in the second precinct of the 20th ward of the city of Chicago, at a general election held November 4, 1930, and that said respondents, "while serving and acting as judges of said election in said precinct, did fraudulently and unlawfully make a false canvass and return of the votes cast in said precinct at said election," and that they "while serving and acting as judges of said election in said precinct, were guilty of corrupt and fraudulent conduct and practice in the duty of said respondents as judges of said election," and the petition prayed that the respondents "show cause, if any they can, why they and each of them, as officers of said court, should not be adjudged guilty of contempt or contempts of this court for misconduct and misbehavior in office on

1070

277 I.A. 611

STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF
NEW YORK, in and for the County of
New York, do hereby certify that
the following is a true and correct
copy of the original as the same
exists in the files of the
County Clerk.

Y.

WILLIAM W. WALKER, County Clerk,
and JAMES W. WALKER, Deputy
County Clerk.

JAMES W. WALKER, Jr.,
Deputy Clerk in Charge.

W. J. WALKER, County Clerk, in and for the County of New York.

On November 14, 1911, a petition was filed in the County
Court of New York, in the name of the People of the State of
New York, on the petition of John A. Walker, filed with the
Board of Election Commissioners of the City of New York, which
alleges that James Walker, Jr., was lawfully and legally qualified
to be a judge of election in the second precinct of the City of New York
of the City of New York, as a general election held November 14, 1911,
and that said respondent, while serving and acting as judge of
said election in said precinct, did fraudulently and unlawfully
make a false canvass and return of the votes cast in said precinct
of said election, and that they "while serving and acting as judges
of said election in said precinct, have failed to return and transmit
said canvass and return in the full of said respondents as judges
of said election," and the petition prays that the respondents
"now named, if any, they are, who have been named of them, be ordered
of said court, should not be regarded guilty of contempt or con-
sidered as such, and that they be ordered to return and transmit in full

account of the matters and things hereinabove alleged." It appears from the record that respondent Coppolla, in a separate hearing, was found not guilty. In the instant hearing the trial court found respondent Scully not guilty, and further found that plaintiff in error, as a judge of said election, "knowingly, fraudulently and unlawfully made a false canvass and return of the votes cast in said precinct at said election;" that he, "by reason of the foregoing was and is guilty of misconduct and misbehavior as an officer of the County Court of Cook County, State of Illinois," and that he "is hereby adjudged guilty of contempt of the County Court of Cook County," and plaintiff in error was thereupon committed to the county jail of Cook county for the period of four months, and this writ of error is sued out to reverse that judgment.

At the election in question Stanley H. Kunz was the Democratic candidate for Representative in Congress for the district of which the precinct was a part, and Peter C. Granata was the Republican candidate for that office, and the alleged false canvass tally proclamation and return of the votes cast in said precinct at said election relates entirely to the tally proclamation and return of the votes as to the said two candidates. The tally sheet returned by the precinct election officials to the city clerk shows 57 straight votes for Kunz and no split votes, and shows for Granata no straight votes, but 220 split votes. A recount of the ballots in open court showed that Granata received 2 straight votes and 181 split votes and that Kunz received 62 straight votes and 12 split votes. The recount further showed that there were 15 blank ballots and 2 spoiled ballots in the box. It appears that the persons who acted as clerks of election and who made the marks on the tally sheets could not be apprehended.

We need notice but one of the contentions raised by

1

... of the

... .. in a
... .. in the
... .. and

... ..

... .. and
... .. in

... ..

... .. of

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

plaintiff in error, viz., "that the charge made against him is not sustained by even a preponderance of the evidence." This contention has been argued with such force that in our consideration of the same we have seen fit to read the entire bill of exceptions, and after a careful consideration of the entire evidence we have reached the conclusion that the contention is a meritorious one and must be sustained. As the charge against plaintiff in error may again be tried, we purposely refrain from analyzing and commenting upon the facts and circumstances in evidence.

The judgment of the County court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

...him as
not known by even a person of the evidence. This
conclusion has been reached after a careful
review of the case we have seen fit to reach the only bill of

exceptions, and after a careful examination of the entire
evidence we have reached the conclusion that the contention is
a speculative one and must be sustained. In the other cases
presented in one or more of the cases, we purposely refrain from
analyzing and commenting upon the facts and circumstances in
evidence.

The judgment of the County Court of Cook County is

reversed and the cause is remanded.

REVEREND AND HONORABLE,

CRISTY, J., and MILLER, J., JUDGES.

37483

WILLIE BELL,
(Plaintiff) Appellee,

v.

CITY OF CHICAGO, a
Municipal Corporation,
(Defendant) Appellant.

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

277 I.A. 611⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in case to recover damages for personal injuries he claims to have sustained while walking upon a defective sidewalk in the City of Chicago. The cause was tried before the court, Judge John T. Cummings, and a jury, and at the close of plaintiff's evidence there was a directed verdict finding defendant guilty and assessing plaintiff's damages at the sum of \$350, and upon the same day, November 21, 1933, judgment was entered upon the verdict. The bill of exceptions shows that the judgment was entered by agreement of counsel for both parties. Upon November 29, 1933, an order was entered that certain attorneys be given leave to file their appearance as attorneys for plaintiff and thereupon these attorneys made a motion to vacate and set aside the judgment that had been entered. Upon the same day the following order was entered: "Thereupon on motion of the attorney for the plaintiff to vacate and set aside the judgment heretofore entered herein it is ordered that said motion be and the same is hereby continued to December 16, 1933." At the time of the entry of this order defendant "objected to the entry of any motion or taking of any proceedings by the court, and pointed out that there was no affidavit or petition filed and no showing made why said motion

3742

WILLIAM B. BELL
(Plaintiff) vs.
JAMES H. BELL
(Defendant)

CITY OF CHICAGO,
Illinois,
County of Cook,
Southern District of Illinois.

2742-11-611

IN SENATE, JUNE 11, 1913.

Plaintiff sued defendant in and to recover damages for

personal injuries he claims to have sustained while riding upon a

defective streetcar in the city of Chicago. The same was tried

before the court, Judge John T. Cummings, and a jury, and at the

close of plaintiff's evidence there was a motion for a directed finding

granted in favor of defendant. Plaintiff's motion was denied.

1913, and upon the same day, November 11, 1913, judgment was entered

upon the verdict. The bill of exceptions shows that the judgment

was entered by agreement of counsel for both parties. Then

November 12, 1913, an order was entered that certain witnesses be

given leave to file their answers on November 12, 1913, and

thereupon these witnesses were a motion to vacate and set aside the

judgment that was entered. Upon this was the following

order was entered: "Whereupon on motion of the plaintiff, the

plaintiff be vacated and set aside the judgment and verdict entered

herein as it appears that said motion was not made in due time.

Continued to November 12, 1913." It was then at the entry of this

order defendant objected to the entry of any motion or judgment of

any proceeding by the court, and motion was then made and no

should be granted or judgment be disturbed." On December 16, 1933, Judge Cummings was absent from the court and the motion was not disposed of during the November term. Upon December 19, 1933, plaintiff presented the following affidavit in support of his motion to vacate the judgment and for a new trial, and asked leave to file it:

"Willie Bell, being first duly sworn upon his oath, deposes and says that he is the plaintiff in the above captioned cause; that by reason of the injuries he sustained as alleged in the declaration deponent suffered the amputation of one of his legs; that the verdict and judgment for \$350 and costs heretofore entered in said cause were entered pursuant to an agreement between the attorneys for defendant and the attorneys then representing deponent; that the attorneys then representing plaintiff did not explain to deponent the reasons, if any, for agreeing to said verdict and judgment; that deponent believes that one of the reasons plaintiff's attorneys agreed to said judgment was that the defendant denied the sufficiency of the statutory notice of injury set forth in the declaration, and defendant claimed the said notice was insufficient because it failed to give the name of an attending physician for plaintiff; that if the said notice were insufficient it would be due to the negligence of the attorneys then representing deponent, and said attorneys therefore may have had an ulterior motive in agreeing to said judgment, since if the case were settled by an agreed judgment the sufficiency of the notice would not be tested, whereas if the trial were prosecuted and the notice held insufficient, plaintiff's said attorneys would be liable to plaintiff in an action for negligence; and deponent further says that his said attorneys did not advise him as to what amount was agreed upon to be entered as a judgment; that deponent's attorneys did not, prior to the time they agreed to said judgment, have any authority from deponent to make such agreement; that deponent was not informed of the fact of settlement or the amount of the agreed judgment until after the same was entered, and deponent at no time authorized or ratified such agreement; that deponent was not in court when said judgment and verdict were entered, having been requested by his attorneys to wait in the corridor outside the courtroom; that deponent had no knowledge that said judgment was to be entered; that the only purpose in calling him out of the courtroom was that the said judgment might be entered without giving him an opportunity to protest; that deponent was not at any time informed by the court of the proposed agreed verdict and judgment, and the court did not at any time ask plaintiff if he agreed to said judgment and understood the nature of the transaction.

"Deponent further says that he is a Negre, 31 years of age; that all the education deponent ever had was 12 months attendance in a rural school in Mississippi, when he was about eight years of age; that in view of plaintiff's injuries the judgment for \$350 is unconscionable a fraud upon plaintiff, who is either entitled to compensatory damages or nothing.

"And deponent further says that following his injury mentioned in the declaration he was a patient in Cook County

to verify the judgment and for a new trial, was asked leave to file a petition praying the following matters be removed to the venue of trial, the answer thereto, filed November 11, 1933, Judge Cummings was asked leave to move and the motion was set for trial at Chicago on January 10, 1934.

1. The first question is whether the defendant is a citizen of the United States. The defendant is a citizen of the United States.

2. The second question is whether the defendant is a resident of the United States. The defendant is a resident of the United States.

3. The third question is whether the defendant is a member of the armed forces of the United States. The defendant is a member of the armed forces of the United States.

4. The fourth question is whether the defendant is a member of the reserve forces of the United States. The defendant is a member of the reserve forces of the United States.

5. The fifth question is whether the defendant is a member of the National Guard of the United States. The defendant is a member of the National Guard of the United States.

6. The sixth question is whether the defendant is a member of the National Guard of the United States. The defendant is a member of the National Guard of the United States.

7. The seventh question is whether the defendant is a member of the National Guard of the United States. The defendant is a member of the National Guard of the United States.

8. The eighth question is whether the defendant is a member of the National Guard of the United States. The defendant is a member of the National Guard of the United States.

9. The ninth question is whether the defendant is a member of the National Guard of the United States. The defendant is a member of the National Guard of the United States.

10. The tenth question is whether the defendant is a member of the National Guard of the United States. The defendant is a member of the National Guard of the United States.

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a very important document, as it contains the President's views on the state of the Union and the progress of the war. The letter is written in a very formal and dignified style, and it is one of the most important documents of the Civil War era.

Hospital, a public charitable hospital; that deponent had no attending physician, but was cared for by numerous nurses, internes and doctors connected with said hospital who were from time to time changed by the hospital authorities.

"And deponent says that he is advised by his present attorneys that in their opinion the notice served on the defendant is sufficient in law.

"This affidavit is made to induce the Circuit Court of Cook County to set aside and vacate a judgment and verdict which purported to have been agreed to by plaintiff, but which was not agreed to by plaintiff, and was merely agreed to by plaintiff's attorneys without plaintiff's knowledge or authority.

"Deponent says that this affidavit has been read to him and he understands the same. Further deponent sayeth not."

The court granted leave to file the affidavit and it was filed instant. Although due notice of the motion had been served upon attorneys for defendant, it appears that they were not present at the time of the making of the motion and the entry of the order, but after plaintiff's attorney had left the court room defendant's attorney, "who had been delayed in another court-room, appeared before the court and objected to filing of said affidavit on the ground that the judgment term had passed and the court had lost all jurisdiction to vacate or disturb or modify said judgment and asked the court not to consider said affidavit," but the court overruled defendant's objection. On February 3, 1934, plaintiff's motion to vacate came on for hearing and thereupon defendant objected to the trial court's "going into the facts," upon "the ground that the court loses jurisdiction at the expiration of the term time and on the further ground that this is a judgment in the nature of a consent decree and cannot be attacked in this cause. It must be attacked by proceedings in chancery." The trial court, after hearing arguments, held that the court had jurisdiction over the judgment and thereupon defendant, upon its motion, was granted leave to file counter-affidavits and the cause was continued to February 17, 1934. Upon that date defendant filed affidavits of plaintiff's former attorneys who represented him during the trial

to itself, a similar incident occurred; that defendant had no intention of doing so, but was forced to by the hospital nurses, inmates and doctors connected with said hospital who were from time to time charged by the hospital authorities.

"And defendant says that he is advised by his present attorneys that in their opinion the notice served on the defendant is not valid in law.

"This affidavit is made to induce the Circuit Court of Cook County to set aside and vacate a judgment and verdict which purported to have been returned by plaintiff, but which was not agreed to by plaintiff, and was merely agreed to by plaintiff's attorneys without plaintiff's knowledge or authority.

"Defendant says that this affidavit has been read to him and he understood the same. Further defendant says that."

The court granted leave to file the affidavit and it was filed in-
stantly. Although due notice of the motion had been given upon

attorneys for defendant, it appears that they were not present at the time of the making of the motion and the entry of the order,

but after plaintiff's attorney had left the court room defendant's attorney, who had been delayed in another court-room, appeared

before the court and objected to filing of said affidavit on the ground that the judgment book had closed and the court had left

all jurisdiction to vacate or disturb or modify said judgment and asked the court not to consider said affidavit, but the court

overruled defendant's objection. On January 3, 1934, plaintiff's motion to vacate came on for hearing and the court granted

objected to the trial court's ruling in the matter, upon the ground that the court lacked jurisdiction at the expiration of the term time and on the further ground that this is a judgment in the

nature of a consent decree and cannot be attacked in this court. It must be attacked by proper means in chancery." The trial court

after hearing the parties, said that the court had jurisdiction over the judgment and therefore defendant, upon the motion, was granted

leave to file counter-affidavit and the court was continued to February 17, 1934. Upon that date defendant filed an affidavit of

defendant, who was present at the trial

of the cause. The substance of the affidavits is that they produced in court Dr. Webster, who testified as to the condition of plaintiff's disability at the time of the trial; that after they had subpoenaed Dr. Finder, who treated plaintiff for a long time prior to the date of the trial, he stated to them that in his opinion the physical condition of plaintiff's leg was not due to the accident but was caused by tuberculosis of the bone and that he would not testify that the accident was the cause of plaintiff's condition, and that for that reason they did not call Dr. Finder to the stand; that both of the said physicians had examined X-ray pictures "subpoenaed from the County Hospital of Cook County" and that neither was able to determine from the pictures that plaintiff had suffered a bone injury to his leg; that the X-ray pictures and reports made at the time that they were made showed a tubercular condition of plaintiff's leg. The affidavits further state that "statutory notice of injury served upon the City is in substance and in accordance with the law as such case provided;" that prior to the time the judgment was entered in the cause plaintiff desired to know if there was a chance of winning the law suit for the reason that the physician who treated him, Dr. Finder, failed to testify in his behalf, and plaintiff stated on the day of the trial, in the presence of Dr. Webster and ^{one} Catlin, that if his attorneys could procure a settlement it was agreeable to him that the same be done; that plaintiff requested the affiants to discuss the matter of settlement with the attorney for defendant, whereupon affiants, as attorneys for plaintiff, went to the office of the city attorney and submitted the sum of \$1,500 in settlement of the claim, but that the attorney representing the city refused to agree to pay said sum and made a counter offer of \$250, and after a discussion of about thirty minutes the attorney for the city raised his offer from \$250

of the cause. The substance of the affidavit is that they produced in court Dr. Ober, who testified as to the condition of plaintiff's disability at the time of the trial; that after they had appeared Dr. Ober, who treated plaintiff for a long time prior to the date of the trial, he stated to them that in his opinion the physical condition of plaintiff's leg was not due to the accident but was caused by tuberculosis of the bone and that he would not testify that the accident was the cause of plaintiff's condition, and that for that reason they did not call Dr. Ober to the stand; that each of the said physicians had examined X-ray pictures "supplied from the County Hospital of Rock County" and that neither was able to determine from the pictures that plaintiff had suffered a bone injury to his leg; that the X-ray pictures and reports made at the time that they were made showed a tubercular condition of plaintiff's leg. The affidavits further state that "every notice of injury given under this act is in substance and in accordance with the law as such case provided;" that prior to the time the judgment was entered in the cause plaintiff desired to know if there was a chance of winning the law suit for the reason that the physician who treated him, Dr. Ober, failed to testify in his behalf, and plaintiff stated on the day of the trial, in the presence of Dr. Ober and ^{one} ~~another~~ attorney, that if his attorneys could procure a settlement it was agreeable to him that the same be done; that plaintiff requested the attorney to discuss the matter of settlement with the attorney for defendant, whereupon attorney as attorneys for plaintiff, went to the office of the city attorney and deposited the sum of \$1,500 in settlement of the claim, but that the attorney representing the city refused to agree to pay said sum and made a counter offer of \$250, and after a discussion of about thirty minutes the attorney for the city refused his offer from \$250

to \$350, which offer was submitted to plaintiff and he immediately agreed to accept the said sum in settlement of his claim and authorized and directed his attorneys, in the presence of Dr. Webster and Catlin, to settle the case for the said sum. The affidavits further state that plaintiff was not advised to leave the court room but was requested to be in the court room at the time the judgment was entered and that he failed to be there of his own volition. After a consideration of the affidavits the trial court entered an order that "the verdict and judgment entered herein be and the same is hereby vacated and set aside and a new trial awarded." On May 2, 1934, we granted the petition of defendant for leave to appeal from the entry of said order.

The major contention of defendant is that the trial court was without jurisdiction to vacate the judgment and to grant a new trial. There is no merit in this contention. The oral motion to vacate was made and entered of record at the term in which the judgment was entered. Not having been decided by the court at that term, it was continued, by operation of law, from term to term, until it was decided. (See Shannahan v. Stevens, 139 Ill. 428, 432.) Many other cases to the same effect might be cited, but the rule stated therein is well settled in this state. Defendant argues, however, that the unsupported oral motion to vacate the judgment made during the November term was abandoned by plaintiff because no affidavit in support of the motion was made during that term. The case just cited decides that it is not necessary to present affidavits in support of a motion to vacate at the term at which the motion is made; that "it is sufficient that they were presented when the court considered and decided the motion."

Defendant argues that without an affidavit showing good grounds the trial court would not have had the discretionary power

to 1900, which after was admitted to plaintiff and he immediately
agreed to accept the said and in recognition of his claim and author-
ized and directed his attorney, in the presence of Dr. Webster
and Gelling, to execute the same for the said name. The affidavit
forbade that plaintiff was not advised to leave the court
room but was requested to be in the court room at the time the
judgment was entered and that he failed to be there of his own
volition. After a consideration of the affidavit the trial court
entered an order that "the verdict and judgment entered herein be
and the same is hereby vacated and set aside and a new trial awarded."
In May, 1900, plaintiff filed a petition of defendant for leave to
appeal from the entry of said order.

The major contention of defendant is that the trial court
was without jurisdiction to vacate the judgment and to grant a new
trial. There is no merit in this contention. The trial court to
vacate was made and entered of record at the time in which the judg-
ment was entered. Not having been decided by the court at that
time, it was continued, by operation of law, from term to term, until
it was decided. (*See* Shanklin v. Weaver, 125 Ill. App. 432.) Many
other cases to the same effect might be cited, but the rule stated
therein is well settled in this state. Defendant argues, however,
that the unsupported oral motion to vacate the judgment made during
the former term was abandoned by plaintiff because no affidavit in
support of the motion was made during that term. The court just cited
declines that it is not necessary to present affidavits in support of
a motion to vacate at the term at which the motion is made; that
"it is sufficient that they were presented when the court considered
and decided the motion."

Defendant argues that without an affidavit and legal good
grounds the trial court could not have had the discretionary power

to vacate the judgment upon a mere motion during the November term; but in the instant case the trial court did not vacate the judgment until the affidavit of plaintiff had been filed. After carefully considering the argument of defendant that the court abused his discretion in vacating the judgment and in granting a new trial, we have reached the conclusion that we cannot say that the court abused his discretion in entering the order now in question. The trial court was of the opinion that justice would be best served by a new trial of the cause and we do not feel that we would be justified in holding that he abused his discretion in entering the judgment order in question.

Defendant contends that the bill of exceptions of the trial of the cause shows that the statutory notice to defendant was not sufficient and that, therefore, jurisdiction was lacking. Plaintiff contends, and with force, that in view of the charge made by plaintiff against his former attorneys the question as to whether or not the evidence introduced upon the trial was sufficient to make out a prima facie case for plaintiff is not material in this proceeding. We may say that several of the points raised by defendant in support of the instant contention are without the slightest merit. It is true that the bill of exceptions of the trial does not show that the statutory notice was filed in the city attorney's office, but the statement of counsel for plaintiff to this court that the city attorney's office admits that the notice was duly filed in the city attorney's office, has not been challenged by counsel for defendant. If a new trial is had, the defect in the original proof may be cured. Moreover, after the court had held that it had jurisdiction over the judgment, defendant filed two affidavits upon the merits in opposition to the motion to vacate the judgment, in each of which it is averred "that statutory notice of injury served upon the City is in substance

to vacate the judgment upon a mere motion during the November term; but in the instant case the trial court did not vacate the judgment until the affidavit of plaintiff had been filed. This carefully considering the argument of defendant that the court should have vacated the judgment in vacating the judgment and in granting a new trial, we have reached the conclusion that we cannot say that the court abused its discretion in entering the order now in question. The trial court was of the opinion that justice would be best served by a new trial of this case and we do not feel that we would be justified in holding that the court's discretion in entering the judgment order in question was an abuse of discretion. The bill of exceptions of the trial court shows that the attorney moved for judgment and was not successful and that, therefore, judgment was lacking. Plaintiff contends, and this court, that in view of the charge made by defendant against his former attorney, the question as to whether or not the evidence introduced upon the trial was sufficient to make out a prima facie case for plaintiff is not material in this proceeding. We say that several of the points raised by defendant in support of the instant contention are without the slightest merit. It is true that the bill of exceptions of the trial court does not show that the attorney moved for a trial in the city attorney's office, but the statement of counsel for plaintiff to this court that the city attorney's office stated that the motion was only filed in the city attorney's office, has not been challenged by counsel for defendant. If a new trial is had, the defect in the original trial may be cured. However, after the court has held that it had jurisdiction over the judgment, defendant filed two affidavits upon the merits in opposition to the motion to vacate the judgment, in each of which it is averred that the attorney moved for a new trial upon the city is in substance

and in accordance with the law as such case provided." True it is that defendant used the said averment in the affidavits for the purpose of showing that the former counsel for plaintiff had not been negligent in handling the case, but having taken that position before the trial court upon the motion to vacate, it should not now be allowed to take a contrary position here.

The judgment of the Circuit court of Cook county entered February 17, 1934, vacating the verdict and judgment that had been theretofore entered in the cause and awarding a new trial to plaintiff, is affirmed.

AFFIRMED.

Gridley, P. J., and Sullivan, J., concur.

and in accordance with the law we have observed. This is
is that there is no need for any further action in the
purpose of showing that the former counsel for plaintiff had not
been negligent in handling the case, but having taken proper
before the trial court upon the motion to dismiss it should not
now be allowed to claim a summary position here.
The judgment of the circuit court of Cook County, entered
February 17, 1937, awarding the verdict and judgment said and from
interlocutory entered in the case and awarding a new trial to
plaintiff, is affirmed.

WILLIAM H. ...

Quigley, P. J., and Sullivan, J., concur.

37313

JOSEPH LOWENSTEIN,
Plaintiff in Error,

v.

SCHIFF TRUST & SAVINGS BANK,
a corporation,
Defendant in Error.

17 H
ERROR TO SUPERIOR COURT,
COOK COUNTY.

277 I.A. 612¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Joseph Lowenstein, plaintiff, filed a suit in assumpsit against the Schiff Trust & Savings Bank, (hereinafter referred to as the Bank), defendant, and a trial was had by the court without a jury. At the conclusion of plaintiff's evidence defendant, without offering any proof, moved the court to enter a finding in defendant's behalf, which motion was granted, and pursuant thereto the court entered a finding in favor of defendant and judgment against plaintiff for costs. This appeal seeks to reverse the judgment.

This cause went to trial on plaintiff's second amended declaration consisting of three special counts and the common counts, to all of which defendant filed a plea of the general issue. No question is raised on the pleadings.

Plaintiff alleged in his declaration that a confidential relationship existed between the parties, and that relying upon the false representations of defendant as to the value of certain land and the building thereon and the rental value of same, he purchased \$16,000 in notes secured by a first mortgage on said premises in October, 1928, from defendant; that he received payment of \$1,500 of the principal notes and \$2,400 in interest prior to May 22, 1931, when the mortgagor defaulted in the payment of

17
 18
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28
 29
 30
 31
 32
 33
 34
 35
 36
 37
 38
 39
 40
 41
 42
 43
 44
 45
 46
 47
 48
 49
 50
 51
 52
 53
 54
 55
 56
 57
 58
 59
 60
 61
 62
 63
 64
 65
 66
 67
 68
 69
 70
 71
 72
 73
 74
 75
 76
 77
 78
 79
 80
 81
 82
 83
 84
 85
 86
 87
 88
 89
 90
 91
 92
 93
 94
 95
 96
 97
 98
 99
 100

101

102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200

201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300

301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400

401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500

501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600

601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612
 613
 614
 615
 616
 617
 618
 619
 620
 621
 622
 623
 624
 625
 626
 627
 628
 629
 630
 631
 632
 633
 634
 635
 636
 637
 638
 639
 640
 641
 642
 643
 644
 645
 646
 647
 648
 649
 650
 651
 652
 653
 654
 655
 656
 657
 658
 659
 660
 661
 662
 663
 664
 665
 666
 667
 668
 669
 670
 671
 672
 673
 674
 675
 676
 677
 678
 679
 680
 681
 682
 683
 684
 685
 686
 687
 688
 689
 690
 691
 692
 693
 694
 695
 696
 697
 698
 699
 700

principal and interest; that, having discovered then for the first time that he was induced to purchase the mortgage because of defendant's false representations, he promptly notified defendant of his rescission of the contract of purchase of the mortgage, tendered the bank the remaining notes and mortgage and demanded that it return to him \$14,500, the unpaid balance of the mortgage. Upon its refusal to do so this action was brought.

Plaintiff contends that the trial court erred in entering a finding and judgment in favor of defendant upon the undisputed evidence of plaintiff, because (1) a confidential relationship in fact was shown to have existed between the parties; (2) the false representations by defendant to plaintiff as to the value of the property upon which the mortgage was given, and the rental value of same, were representations of fact and not of opinion; (3) the trial court confused the measure of damages in actions of fraud and deceit with the measure of damages pursuant to a rescission; (4) the failure of plaintiff to discover the fraud was explained by the continual confidential relationship between the parties and their further dealings; and (5) the tender by plaintiff pursuant to his rescission of the contract for the purchase of the mortgage was sufficient.

Defendant's theory is that plaintiff, having purchased the mortgage in 1928 for \$16,000, and having collected prior to May 22, 1931, \$2,400 in interest and \$1,500 on the principal thereof, cannot rescind his contract because the mortgagor defaulted; that a confidential relationship did not exist in fact between the parties; and that the representations as to the value of the property in question and its rental value were mere expressions of opinion and not representations of fact, and the plaintiff could have discovered the truth or falsity of such representations by the exercise of due

principal and interest; that, however, for the first time that he was in need to purchase the necessary amount of land and a fair representation, he promptly settled payment of the interest of the contract of purchase of the mortgage, furnished the bank the remaining notes and mortgage and stated that it refers to him as to the amount of the mortgage. Upon the return to do so this action was brought.

Plaintiff contends that the trial court erred in entering

a finding and judgment in favor of defendant upon the undisputed evidence of plaintiff, because (1) a confidential relationship is not shown to have existed between the parties; (2) the interest representation by defendant as plaintiff is to the value of the property upon which the mortgage was given, and the finding of fact, were representations of fact and not of opinion; (3) the trial court erred in finding the mortgage in violation of law and based all the evidence of defendant's conduct to a conclusion; (4) the failure of plaintiff to discover the terms was explained by the confidential relationship; (5) the finding between the parties and their further dealings; and (6) the finding by plaintiff defendant to his rescission of the contract for the purchase of the mortgage was sufficient.

Defendant's theory is that plaintiff, having purchased

the mortgage in 1927 for \$1,000, and having collected prior to May 21, 1931, \$1,400 in interest and \$1,000 on the principal thereof, cannot rescind his contract because the mortgage was not a confidential relationship did not exist in fact between the parties; and that the representation as to the value of the property in question and the rental value were mere representations of opinion and not representations of fact, and the plaintiff could have discovered the truth or falsity of such representations by the exercise of due

diligence before he purchased the mortgage.

Plaintiff testified in his own behalf that he was sixty-six years old at the time of the trial in April, 1933; that he resided in Negaunee, Michigan, which is about four hundred miles from Chicago, and that he had been in the general merchandise business there for forty years; that he knew Benjamin J. Schiff, president of defendant bank, his son Seymour and other officers of the bank; that plaintiff and Benjamin J. Schiff and their families visited at each other's homes; that in 1928, he, two of his children and his wife were depositors in the bank, and that he was a stockholder therein; that prior to and after October, 1928, he had purchased mortgages and bonds from defendant; that prior to October, 1928, he had confidence in Benjamin J. Schiff's advice in reference to his financial and legal problems and relied on the truth of what he told him; and that prior to March 5, 1925, he had advised the officers of the bank as to the securities he owned.

Plaintiff testified further that he purchased the mortgage in question after receiving the following letter from J.M. Silverman of the Bank:

SCHIFF TRUST & SAVINGS BANK
Capital and Surplus \$800,000.00
Under State and Chicago Clearing House Supervision
Chicago

October 8, 1928.

Mr. Joseph Lowenstein,
Negaunee, Michigan.
Dear Mr. Lowenstein:

Again referring to your letter of June 18th relative to renewing the first mortgage loan on the Kedzie Stores, this is to advise that we have communicated several times with the owner of these stores, but have been unable to secure the renewal, for the reason that he desired a much larger loan than it formerly was and has obtained it elsewhere.

However, we have on hand at present an exceptionally well secured \$16,000.00 first mortgage loan bearing interest at 6%, which we are pleased to offer to you for the re-investment of your funds and of which we are enclosing a photograph and detailed memorandum.

We recommend this loan for safe investment and trust you will find it to meet with your requirements.

Yours very truly,
J. M. Silverman,
Bond Department."

testimony before the grand jury.

Plaintiff testified in his own behalf that he was

eighty-one years old at the time of the trial in 1961; that

he resided in Memphis, Tennessee, at the time of the trial;

that he was born in 1880, and that he had been in the United States

since that time; that he was a native-born American citizen;

that he was a member of the United States Army during the

First World War; that he was honorably discharged from the

Army in 1919; that he was a member of the United States Navy

during the Second World War; that he was honorably discharged

from the Navy in 1946; that he was a member of the United States

Marine Corps during the Korean War; that he was honorably

discharged from the Marine Corps in 1953; that he was a member

of the United States Coast Guard during the Vietnam War; that

he was honorably discharged from the Coast Guard in 1960;

Plaintiff testified further that he was a member of the

United States Marine Corps during the Vietnam War; that he

was honorably discharged from the Marine Corps in 1960;

Plaintiff testified further that he was a member of the

United States Coast Guard during the Vietnam War; that he

was honorably discharged from the Coast Guard in 1960;

Plaintiff testified further that he was a member of the

United States Marine Corps during the Vietnam War; that he

was honorably discharged from the Marine Corps in 1960;

Plaintiff testified further that he was a member of the

United States Coast Guard during the Vietnam War; that he

was honorably discharged from the Coast Guard in 1960;

Plaintiff testified further that he was a member of the

United States Marine Corps during the Vietnam War; that he

was honorably discharged from the Marine Corps in 1960;

The letter was accompanied by a photograph of the premises and the following detailed memorandum concerning the mortgage recommended to plaintiff:

"SCHIFF TRUST & SAVINGS BANK
Real Estate Loan Department,

To: Mr. Joseph Lowenstein,
Negaunee, Michigan.

"We own and offer the following first mortgage loan subject to prior sale.

Amount \$16,000.00 Dated May 22, 1928 Interest Rate 6%
Loan No. 1066.

Prepayments:

Stricken out { \$500.00 - 1 1/2 yrs. 11/22/1929
500.00 - 2 yrs. 5/22/1930
500.00 - 2 1/2 yrs. 11/22/1930.

\$500.00 - 3 yrs. 5/22/31
500.00 - 3 1/2 yrs. 11/22/31
500.00 - 4 yrs. 5/22/31
500.00 - 4 1/2 yrs.
2500.00 - 5 yrs.

Location: 2009-19 West 69th Street. Size of Lot: 100x125.

Building: One story brick building containing 6 stores. Stove heat. Rental value \$4,320.00 per year. Value of land: \$15,000.00. Value of building \$18,000.00. Value \$33,000.00

Title is guaranteed by the Chicago Title & Trust Company who are also Trustee. Makers: Ida Hirschberg and Harry Hirschberg her husband."

The first question presented for our determination on this appeal is whether or not a confidential relationship did in fact exist between the parties. Plaintiff's counsel at page 8 of his reply brief states that a clear definition of what constitutes a confidential relationship is contained in Thomas v. Whitney, 186 Ill. 225, 230, which quotes Pomeroy's Equity Jurisprudence (Vol. 2, sec. 955) as follows:

"The term fiduciary or confidential relation, as used in this connection, is a very broad one. It has been said that it exists, and that relief has been granted, in all cases in which influence has been acquired and abused - in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which

exist whenever one man trusts in and relies upon another. The only question is, does such a relation in fact exist?"

We agree with counsel that the Thomas case correctly enunciates the law of this state as to what constitutes a confidential relationship. Counsel, however, attempts to segregate the italicized words from the rest of the text of the opinion and then urges that these words alone define a confidential relationship. By themselves they do not state the law as to what determines such a relationship. It is not sufficient in order to establish a confidential relation that one man trusts and relies upon another, but there must be present the further element that because of such trust and reliance the second acquired an influence over the first.

In transactions between the parties to the injury of the one, when such relationship in fact is shown to exist, in order for him to secure relief it is only necessary to show that the confidence reposed has been betrayed and the influence acquired over the one by the other has been abused.

A careful inspection of the bill of exceptions in this case reveals not a scintilla of evidence that even tends to show that defendant ever acquired any influence over plaintiff.

Plaintiff urges that from the facts testified to by plaintiff, as heretofore set forth, a confidential relationship necessarily existed between the parties. These facts and the inferences that may reasonably be drawn therefrom merely tended to show that plaintiff and members of his family and Benjamin J. Schiff and members of his family enjoyed friendly social relations, that plaintiff believed that the officers of defendant were honorable men and that he had sufficient faith in the fair dealing of the bank and its officers to justify him in transacting business with it and even becoming a stockholder, but it falls far short of the proof required to show

THE UNIVERSITY OF CHICAGO

ស្រុកស្រែចម្ការ ខេត្តកំពង់ចាម ថ្ងៃទី ០១ ខែ កុម្ភៈ ឆ្នាំ ២០១២

RECEIVED FOR THE PRESIDENT OF THE UNITED STATES

no change in the number of cases, and the number of cases

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a profound effect on the economy and society.

...the first of the series of the ...

How do you feel about the way you are being treated?

U. S. DEPARTMENT OF AGRICULTURE

...and the results may be used for information

entitled "The History of the County of York, from the Earliest Period to the Present Time, by Thomas Thoresby, Esq. 1729. 2 vols. 8vo. 1729. 1730. 1731. 1732. 1733. 1734. 1735. 1736. 1737. 1738. 1739. 1740. 1741. 1742. 1743. 1744. 1745. 1746. 1747. 1748. 1749. 1750. 1751. 1752. 1753. 1754. 1755. 1756. 1757. 1758. 1759. 1760. 1761. 1762. 1763. 1764. 1765. 1766. 1767. 1768. 1769. 1770. 1771. 1772. 1773. 1774. 1775. 1776. 1777. 1778. 1779. 1780. 1781. 1782. 1783. 1784. 1785. 1786. 1787. 1788. 1789. 1790. 1791. 1792. 1793. 1794. 1795. 1796. 1797. 1798. 1799. 1800. 1801. 1802. 1803. 1804. 1805. 1806. 1807. 1808. 1809. 1810. 1811. 1812. 1813. 1814. 1815. 1816. 1817. 1818. 1819. 1820. 1821. 1822. 1823. 1824. 1825. 1826. 1827. 1828. 1829. 1830. 1831. 1832. 1833. 1834. 1835. 1836. 1837. 1838. 1839. 1840. 1841. 1842. 1843. 1844. 1845. 1846. 1847. 1848. 1849. 1850. 1851. 1852. 1853. 1854. 1855. 1856. 1857. 1858. 1859. 1860. 1861. 1862. 1863. 1864. 1865. 1866. 1867. 1868. 1869. 1870. 1871. 1872. 1873. 1874. 1875. 1876. 1877. 1878. 1879. 1880. 1881. 1882. 1883. 1884. 1885. 1886. 1887. 1888. 1889. 1890. 1891. 1892. 1893. 1894. 1895. 1896. 1897. 1898. 1899. 1900. 1901. 1902. 1903. 1904. 1905. 1906. 1907. 1908. 1909. 1910. 1911. 1912. 1913. 1914. 1915. 1916. 1917. 1918. 1919. 1920. 1921. 1922. 1923. 1924. 1925. 1926. 1927. 1928. 1929. 1930. 1931. 1932. 1933. 1934. 1935. 1936. 1937. 1938. 1939. 1940. 1941. 1942. 1943. 1944. 1945. 1946. 1947. 1948. 1949. 1950. 1951. 1952. 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403.

... ..

10-10-1964

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1960. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1960. This has led to a concentration of the population in urban areas, which has had a profound effect on the economy and society.

or to support it is an only one of the

7.7 billion, representing 10% of the total population of the world.

1. The first group of people who are not allowed to enter the country are those who are not citizens of the United States.

... ..

1999-2000: 100% of the population is covered by the health insurance scheme.

1. The first part of the text discusses the importance of maintaining accurate records of all transactions, including sales, purchases, and expenses. It emphasizes that proper record-keeping is essential for determining the correct amount of tax liability.

22. 4. 1950. 10. 1950. 11. 1950. 12. 1950. 1. 1951. 2. 1951. 3. 1951. 4. 1951. 5. 1951. 6. 1951. 7. 1951. 8. 1951. 9. 1951. 10. 1951. 11. 1951. 12. 1951. 1. 1952. 2. 1952. 3. 1952. 4. 1952. 5. 1952. 6. 1952. 7. 1952. 8. 1952. 9. 1952. 10. 1952. 11. 1952. 12. 1952. 1. 1953. 2. 1953. 3. 1953. 4. 1953. 5. 1953. 6. 1953. 7. 1953. 8. 1953. 9. 1953. 10. 1953. 11. 1953. 12. 1953. 1. 1954. 2. 1954. 3. 1954. 4. 1954. 5. 1954. 6. 1954. 7. 1954. 8. 1954. 9. 1954. 10. 1954. 11. 1954. 12. 1954. 1. 1955. 2. 1955. 3. 1955. 4. 1955. 5. 1955. 6. 1955. 7. 1955. 8. 1955. 9. 1955. 10. 1955. 11. 1955. 12. 1955. 1. 1956. 2. 1956. 3. 1956. 4. 1956. 5. 1956. 6. 1956. 7. 1956. 8. 1956. 9. 1956. 10. 1956. 11. 1956. 12. 1956. 1. 1957. 2. 1957. 3. 1957. 4. 1957. 5. 1957. 6. 1957. 7. 1957. 8. 1957. 9. 1957. 10. 1957. 11. 1957. 12. 1957. 1. 1958. 2. 1958. 3. 1958. 4. 1958. 5. 1958. 6. 1958. 7. 1958. 8. 1958. 9. 1958. 10. 1958. 11. 1958. 12. 1958. 1. 1959. 2. 1959. 3. 1959. 4. 1959. 5. 1959. 6. 1959. 7. 1959. 8. 1959. 9. 1959. 10. 1959. 11. 1959. 12. 1959. 1. 1960. 2. 1960. 3. 1960. 4. 1960. 5. 1960. 6. 1960. 7. 1960. 8. 1960. 9. 1960. 10. 1960. 11. 1960. 12. 1960. 1. 1961. 2. 1961. 3. 1961. 4. 1961. 5. 1961. 6. 1961. 7. 1961. 8. 1961. 9. 1961. 10. 1961. 11. 1961. 12. 1961. 1. 1962. 2. 1962. 3. 1962. 4. 1962. 5. 1962. 6. 1962. 7. 1962. 8. 1962. 9. 1962. 10. 1962. 11. 1962. 12. 1962. 1. 1963. 2. 1963. 3. 1963. 4. 1963. 5. 1963. 6. 1963. 7. 1963. 8. 1963. 9. 1963. 10. 1963. 11. 1963. 12. 1963. 1. 1964. 2. 1964. 3. 1964. 4. 1964. 5. 1964. 6. 1964. 7. 1964. 8. 1964. 9. 1964. 10. 1964. 11. 1964. 12. 1964. 1. 1965. 2. 1965. 3. 1965. 4. 1965. 5. 1965. 6. 1965. 7. 1965. 8. 1965. 9. 1965. 10. 1965. 11. 1965. 12. 1965. 1. 1966. 2. 1966. 3. 1966. 4. 1966. 5. 1966. 6. 1966. 7. 1966. 8. 1966. 9. 1966. 10. 1966. 11. 1966. 12. 1966. 1. 1967. 2. 1967. 3. 1967. 4. 1967. 5. 1967. 6. 1967. 7. 1967. 8. 1967. 9. 1967. 10. 1967. 11. 1967. 12. 1967. 1. 1968. 2. 1968. 3. 1968. 4. 1968. 5. 1968. 6. 1968. 7. 1968. 8. 1968. 9. 1968. 10. 1968. 11. 1968. 12. 1968. 1. 1969. 2. 1969. 3. 1969. 4. 1969. 5. 1969. 6. 1969. 7. 1969. 8. 1969. 9. 1969. 10. 1969. 11. 1969. 12. 1969. 1. 1970. 2. 1970. 3. 1970. 4. 1970. 5. 1970. 6. 1970. 7. 1970. 8. 1970. 9. 1970. 10. 1970. 11. 1970. 12. 1970. 1. 1971. 2. 1971. 3. 1971. 4. 1971. 5. 1971. 6. 1971. 7. 1971. 8. 1971. 9. 1971. 10. 1971. 11. 1971. 12. 1971. 1. 1972. 2. 1972. 3. 1972. 4. 1972. 5. 1972. 6. 1972. 7. 1972. 8. 1972. 9. 1972. 10. 1972. 11. 1972. 12. 1972. 1. 1973. 2. 1973. 3. 1973. 4. 1973. 5. 1973. 6. 1973. 7. 1973. 8. 1973. 9. 1973. 10. 1973. 11. 1973. 12. 1973. 1. 1974. 2. 1974. 3. 1974. 4. 1974. 5. 1974. 6. 1974. 7. 1974. 8. 1974. 9. 1974. 10. 1974. 11. 1974. 12. 1974. 1. 1975. 2. 1975. 3. 1975. 4. 1975. 5. 1975. 6. 1975. 7. 1975. 8. 1975. 9. 1975. 10. 1975. 11. 1975. 12. 1975. 1. 1976. 2. 1976. 3. 1976. 4. 1976. 5. 1976. 6. 1976. 7. 1976. 8. 1976. 9. 1976. 10. 1976. 11. 1976. 12. 1976. 1. 1977. 2. 1977. 3. 1977. 4. 1977. 5. 1977. 6. 1977. 7. 1977. 8. 1977. 9. 1977. 10. 1977. 11. 1977. 12. 1977. 1. 1978. 2. 1978. 3. 1978. 4. 1978. 5. 1978. 6. 1978. 7. 1978. 8. 1978. 9. 1978. 10. 1978. 11. 1978. 12. 1978. 1. 1979. 2. 1979. 3. 1979. 4. 1979. 5. 1979. 6. 1979. 7. 1979. 8. 1979. 9. 1979. 10. 1979. 11. 1979. 12. 1979. 1. 1980. 2. 1980. 3. 1980. 4. 1980. 5. 1980. 6. 1980. 7. 1980. 8. 1980. 9. 1980. 10. 1980. 11. 1980. 12. 1980. 1. 1981. 2. 1981. 3. 1981. 4. 1981. 5. 1981. 6. 1981. 7. 1981. 8. 1981. 9. 1981. 10. 1981. 11. 1981. 12. 1981. 1. 1982. 2. 1982. 3. 1982. 4. 1982. 5. 1982. 6. 1982. 7. 1982. 8. 1982. 9. 1982. 10. 1982. 11. 1982. 12. 1982. 1. 1983. 2. 1983. 3. 1983. 4. 1983. 5. 1983. 6. 1983. 7. 1983. 8. 1983. 9. 1983. 10. 1983. 11. 1983. 12. 1983. 1. 1984. 2. 1984. 3. 1984. 4. 1984. 5. 1984. 6. 1984. 7. 1984. 8. 1984. 9. 1984. 10. 1984. 11. 1984. 12. 1984. 1. 1985. 2. 1985. 3. 1985. 4. 1985. 5. 1985. 6. 1985. 7. 1985. 8. 1985. 9. 1985. 10. 1985. 11. 1985. 12. 1985. 1. 1986. 2. 1986. 3. 1986. 4. 1986. 5. 1986. 6. 1986. 7. 1986. 8. 1986. 9. 1986. 10. 1986. 11. 1986. 12. 1986. 1. 1987. 2. 1987. 3. 1987. 4. 1987. 5. 1987. 6. 1987. 7

that defendant or its officers acquired such an influence over him as to establish a confidential relationship between the parties. Friendship of the parties and the conviction of one that the other is honorable in the conduct of his business is not sufficient in law to constitute a confidential relationship. We are of the opinion, therefore, that plaintiff's contention that a confidential relationship in fact existed between the parties is without merit.

Plaintiff next contends that, because the property covered by the mortgage was four hundred miles distant from his home, he was justified in relying upon defendant's statement as to its value and rental value, and he was not required to exercise any care or diligence to determine such values for himself. In our opinion this contention is equally without merit.

There is absolutely no evidence in the record to show that undue influence was used on plaintiff to encourage or persuade him to purchase the mortgage in question. In fact it appears that the only thing the bank did in connection with the sale of the mortgage was to advise him concerning all of its details in the memorandum which accompanied the bank's letter of October 8, 1928, send him a photograph of the premises and recommend the purchase of the mortgage by him with funds he had in the hands of the bank for investment. He did not consummate the purchase of the mortgage until October 18, 1928.

In cases where the courts have considered the fact that property involved was at some distance from the place of residence of a person who claimed to have been deceived or defrauded, the rule has been definitely announced that such consideration would not be indulged in if the person to whom the alleged false representations were made had an opportunity to investigate. It is not urged that plaintiff was rushed into his bargain. He testified that he, as

that statement of the evidence regarding such an influence over him as to establish a causal relationship between the purchase of the mortgage and the transfer of one of the other is impossible in the context of his business as not sufficient to have been sufficient to establish a relationship. He is not an investor, but a business man, and his relationship is a commercial relationship in that sense between the parties in which he is.

It is not necessary to say that the property was owned by the mortgagee and that the mortgagee was not a party to the transaction in which the mortgage was made as to the value of the property. It is not necessary to say that the mortgagee was not a party to the transaction in which the mortgage was made as to the value of the property. It is not necessary to say that the mortgagee was not a party to the transaction in which the mortgage was made as to the value of the property.

There is absolutely no evidence in the record to show that the mortgagee was not a party to the transaction in which the mortgage was made as to the value of the property. It is not necessary to say that the mortgagee was not a party to the transaction in which the mortgage was made as to the value of the property. It is not necessary to say that the mortgagee was not a party to the transaction in which the mortgage was made as to the value of the property.

In the case of the mortgagee, it is not necessary to say that the mortgagee was not a party to the transaction in which the mortgage was made as to the value of the property. It is not necessary to say that the mortgagee was not a party to the transaction in which the mortgage was made as to the value of the property. It is not necessary to say that the mortgagee was not a party to the transaction in which the mortgage was made as to the value of the property.

well as his adult son, who was engaged in business with his father, made frequent trips to Chicago, both prior to and after October, 1928, and that neither of them saw fit to investigate the property until after the mortgagor had defaulted. In this day of fast trains and many of them, in our opinion, plaintiff was bound under the law to investigate this property and make a special trip for that purpose, if necessary, before investing his \$16,000, unless the facts in this case show that defendant was guilty of intentional fraud.

Defendant concealed nothing from plaintiff as to the property. Ten days before he purchased the mortgage, plaintiff received a detailed memorandum containing its location, defendant's opinion or best judgment as to the value of the property and its rental value, as well as a photograph of same. Where a similar situation was presented, ample opportunity having been afforded for inspection and examination, and the property, although at a distance, conveniently accessible, the court held in Wightman v. Tucker, 50 Ill. App. 75, 79, as follows:

"Appellant concedes that an action can not ordinarily be maintained for false representations as to value, but contends that an exception to this rule exists when the property is at a distance and not conveniently accessible.

"The property in this case which was the subject of representations, was at a distance, but was conveniently and easily accessible. Keokuk, Iowa, is about twelve hours' ride from Chicago, two or three railroad trains per day affording easy access; it seems that over a week elapsed between the making of those representations and the closing of the deal, within which time there was ample opportunity for appellant to have inspected this stock."

Where the property, although at some distance, may be conveniently reached and examined, it has been held that the general rule requiring exercise of reasonable diligence by the purchaser is applicable. (26 C. J., 1155.)

In the absence of a confidential relationship between the parties and in view of our conclusion that, although four hundred

the fact in this case shows that the value of the property is not as high as it was when the property was first acquired. The value of the property is not as high as it was when the property was first acquired. The value of the property is not as high as it was when the property was first acquired.

[illegible][illegible]

There is no property, although it is stated, but of the
 variously treated and examined, it has been said that the general
 rule regarding existence of reasonable diligence by the shareholder is
 applicable. (See, e.g., 1952.)

In the absence of a controlling relationship between
 the parties and in view of the corporation's status, it is not possible to

times distant from his home, the property was easily and conveniently accessible for inspection and examination by plaintiff, and that plaintiff was, therefore, not relieved of the exercise of care and diligence in making his purchase, were the facts and circumstances as shown by the evidence in this cause such that actual fraud might be implied from them without proof of intentional fraud? The conclusion is inescapable that no actionable fraud has been shown by the evidence in this case.

The evidence presented in this cause utterly fails to show that defendant falsely represented any material fact concerning the property with the intention of defrauding or deceiving plaintiff, but it is urged that defendant's representations of the value of the property, its rental value and that the mortgage was exceptionally well secured were so exaggerated and untrue that actual fraud might be implied from such representations alone. We are unable to agree with this contention.

Defendant itself owned the mortgage before its purchase by plaintiff. It is fair to assume that when the bank either made the loan or purchased the mortgage, the opinion of its officers and their honest judgment must have been that the property was ample security for the mortgage.

The practically unanimous weight of authority in this country is to the effect that where no confidential relationship exists between the parties, and where property offered for sale can be inspected and examined by the purchaser, representations of value are mere expressions of opinion or judgment and are not actionable. This well established rule was stated as follows, in Strubhar v. Shorthoss, 78 Ill. App. 394, 395:

"Statements made by a vendor to his vendee as to the value of his property, when selling the same, where no confidential relations exist between them, and the property to be sold can be seen and inspected by the vendee, are considered as mere seller's statements and furnish no ground for an action for damages, as such

statements do not relieve the vendee from the responsibility of investigating for himself into the true value of the property before purchasing it. Neetling v. Wright, 72 Ill. 390; Van Horn v. Keenan, 28 Ill. 448; Miller v. Craig, 36 Ill. 111; Tuck v. Downing, 76 Ill. 91, and Mosher v. Post, 89 Wis. 602."

In Morel v. Masalski, 333 Ill. 41, 46, our Supreme Court

said:

"* * * A person in possession of his mental faculties is not justified in relying upon representations made when he has ample opportunity to ascertain the truth of the representations before he acts. When he is offered the opportunity of knowing the truth of the representations he is chargeable with knowledge. If he does not avail himself of the means of knowledge open to him he cannot be heard to say he was deceived by the misrepresentations. (Dickinson v. Dickinson, 305 Ill. 521; Hustad v. Gerny, 321 id. 354.) It is only in cases where the parties do not have equal knowledge or means of knowledge of the facts represented that equity will afford relief on the ground of fraud and misrepresentation. Johnson v. Miller, 299 Ill. 276."

Fraud is not to be presumed, but the burden of proving it

is upon the party charging it. This rule is clearly announced in

Wolf v. Lawrence, 276 Ill. 11, where the court used the following

language, on page 19:

"While it is true that fraud may be proved by circumstances, that we seldom expect to prove it by the admissions of the party and often cannot find direct and positive evidence of such fraud (Schwartz v. Reznick, 257 Ill. 479), and that proof of circumstances which convince the mind that fraud has been perpetrated is all that is required, still fraud will not be presumed but must be proved as a fact by such clear and convincing evidence as leaves the mind well satisfied that the allegations of fraud are true. If the motives and designs of a party charged with fraud may be traced to an honest and legitimate source equally as well as to a corrupt one, the honest source must be preferred. McKenna v. Mickelberry, 242 Ill. 117."

There has been an utter failure to prove fraud. No con-

fidential relationship has been shown to have existed between the

parties. The purchaser was afforded ample opportunity to inspect

and examine the property, which was easily accessible. Plaintiff

is thus left to rely upon nothing except defendant's expressions of

opinion as to value, which the courts have uniformly held not

actionable under such facts as are disclosed by the record in this

case. We are of the opinion that the trial court was fully justified

in entering its finding and judgment.

For the reasons indicated herein the judgment is affirmed.
Gridley, P. J., and Scanlan, J., concur.

AFFIRMED.

[illegible]

2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808 2809 2810 2811 2812 2813 2814 2815 2816 2817 2818

272

On the basis of the above information, the Commission has concluded that the information provided by the respondents is not sufficient to establish that the respondents are not engaged in the production of goods or services for the purpose of the Act. The Commission has therefore decided to issue a notice of violation to the respondents.

There is no need to be alarmed, and the presence of a white line

1941-42, 1942-43, 1943-44, 1944-45, 1945-46, 1946-47, 1947-48, 1948-49, 1949-50, 1950-51, 1951-52, 1952-53, 1953-54, 1954-55, 1955-56, 1956-57, 1957-58, 1958-59, 1959-60, 1960-61, 1961-62, 1962-63, 1963-64, 1964-65, 1965-66, 1966-67, 1967-68, 1968-69, 1969-70, 1970-71, 1971-72, 1972-73, 1973-74, 1974-75, 1975-76, 1976-77, 1977-78, 1978-79, 1979-80, 1980-81, 1981-82, 1982-83, 1983-84, 1984-85, 1985-86, 1986-87, 1987-88, 1988-89, 1989-90, 1990-91, 1991-92, 1992-93, 1993-94, 1994-95, 1995-96, 1996-97, 1997-98, 1998-99, 1999-00, 2000-01, 2001-02, 2002-03, 2003-04, 2004-05, 2005-06, 2006-07, 2007-08, 2008-09, 2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19, 2019-20, 2020-21, 2021-22, 2022-23, 2023-24, 2024-25, 2025-26, 2026-27, 2027-28, 2028-29, 2029-30, 2030-31, 2031-32, 2032-33, 2033-34, 2034-35, 2035-36, 2036-37, 2037-38, 2038-39, 2039-40, 2040-41, 2041-42, 2042-43, 2043-44, 2044-45, 2045-46, 2046-47, 2047-48, 2048-49, 2049-50, 2050-51, 2051-52, 2052-53, 2053-54, 2054-55, 2055-56, 2056-57, 2057-58, 2058-59, 2059-60, 2060-61, 2061-62, 2062-63, 2063-64, 2064-65, 2065-66, 2066-67, 2067-68, 2068-69, 2069-70, 2070-71, 2071-72, 2072-73, 2073-74, 2074-75, 2075-76, 2076-77, 2077-78, 2078-79, 2079-80, 2080-81, 2081-82, 2082-83, 2083-84, 2084-85, 2085-86, 2086-87, 2087-88, 2088-89, 2089-90, 2090-91, 2091-92, 2092-93, 2093-94, 2094-95, 2095-96, 2096-97, 2097-98, 2098-99, 2099-00, 2100-01, 2101-02, 2102-03, 2103-04, 2104-05, 2105-06, 2106-07, 2107-08, 2108-09, 2109-10, 2110-11, 2111-12, 2112-13, 2113-14, 2114-15, 2115-16, 2116-17, 2117-18, 2118-19, 2119-20, 2120-21, 2121-22, 2122-23, 2123-24, 2124-25, 2125-26, 2126-27, 2127-28, 2128-29, 2129-30, 2130-31, 2131-32, 2132-33, 2133-34, 2134-35, 2135-36, 2136-37, 2137-38, 2138-39, 2139-40, 2140-41, 2141-42, 2142-43, 2143-44, 2144-45, 2145-46, 2146-47, 2147-48, 2148-49, 2149-50, 2150-51, 2151-52, 2152-53, 2153-54, 2154-55, 2155-56, 2156-57, 2157-58, 2158-59, 2159-60, 2160-61, 2161-62, 2162-63, 2163-64, 2164-65, 2165-66, 2166-67, 2167-68, 2168-69, 2169-70, 2170-71, 2171-72, 2172-73, 2173-74, 2174-75, 2175-76, 2176-77, 2177-78, 2178-79, 2179-80, 2180-81, 2181-82, 2182-83, 2183-84, 2184-85, 2185-86, 2186-87, 2187-88, 2188-89, 2189-90, 2190-91, 2191-92, 2192-93, 2193-94, 2194-95, 2195-96, 2196-97, 2197-98, 2198-99, 2199-00, 2200-01, 2201-02, 2202-03, 2203-04, 2204-05, 2205-06, 2206-07, 2207-08, 2208-09, 2209-10, 2210-11, 2211-12, 2212-13, 2213-14, 2214-15, 2215-16, 2216-17, 2217-18, 2218-19, 2219-20, 2220-21, 2221-22, 2222-23, 2223-24, 2224-25, 2225-26, 2226-27, 2227-28, 2228-29, 2229-30, 2230-31, 2231-32, 2232-33, 2233-34, 2234-35, 2235-36, 2236-37, 2237-38, 2238-39, 2239-40, 2240-41, 2241-42, 2242-43, 2243-44, 2244-45, 2245-46, 2246-47, 2247-48, 2248-49, 2249-50, 2250-51, 2251-52, 2252-53, 2253-54, 2254-55, 2255-56, 2256-57, 2257-58, 2258-59, 2259-60, 2260-61, 2261-62, 2262-63, 2263-64, 2264-65, 2265-66, 2266-67, 2267-68, 2268-69, 2269-70, 2270-71, 2271-72, 2272-73, 2273-74, 2274-75, 2275-76, 2276-77, 2277-78, 2278-79, 2279-80, 2280-81, 2281-82, 2282-83, 2283-84, 2284-85, 2285-86, 2286-87, 2287-88, 2288-89, 2289-90, 2290-91, 2291-92, 2292-93, 2293-94, 2294-95, 2295-96, 2296-97, 2297-98, 2298-99, 2299-00, 2300-01, 2301-02, 2302-03, 2303-04, 2304-05, 2305-06, 2306-07, 2307-08, 2308-09, 2309-10, 2310-11, 2311-12, 2312-13, 2313-14, 2314-15, 2315-16, 2316-17, 2317-18, 2318-19, 2319-20, 2320-21, 2321-22, 2322-23, 2323-24, 2324-25, 2325-26, 2326-27, 2327-28, 2328-29, 2329-30, 2330-31, 2331-32, 2332-33, 2333-34, 2334-35, 2335-36, 2336-37, 2337-38, 2338-39, 2339-40, 2340-41, 2341-42, 2342-43, 2343-44, 2344-45, 2345-46, 2346-47, 2347-48, 2348-49, 2349-50, 2350-51, 2351-52, 2352-53, 2353-54, 2354-55, 2355-56, 2356-57, 2357-58, 2358-59, 2359-60, 2360-61, 2361-62, 2362-63, 2363-64, 2364-65, 2365-66, 2366-67, 2367-68, 2368-69, 2369-70, 2370-71, 2371-72, 2372-73, 2373-74, 2374-75, 2375-76, 2376-77, 2377-78, 2378-79, 2379-80, 2380-81, 2381-82, 2382-83, 2383-84, 2384-85, 2385-86, 2386-87, 2387-88, 2388-89, 2389-90, 2390-91, 2391-92, 2392-93, 2393-94, 2394-95, 2395-96,

121 5700 10 10000

[illegible]

1. This is not a test of the null hypothesis.

It is a fact that the Government has been unable to secure the necessary funds to carry out its program. The Government has been unable to secure the necessary funds to carry out its program. The Government has been unable to secure the necessary funds to carry out its program.

10-10-68

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The process of urbanization is the movement of people from rural areas to urban areas. This is done for a variety of reasons, including the search for better living conditions, the desire for education, and the need for employment. The process of urbanization has led to the growth of large cities and the decline of small towns. This has had a significant impact on the way we live and work. For example, it has led to the development of new technologies and industries, and it has changed the way we think about the world. The process of urbanization is still going on, and it is likely to continue for many years to come. This is because there are still many people who are looking for better living conditions, and there are still many people who are looking for employment. The process of urbanization is a complex one, and it is one that has shaped the world in many ways. It is a process that we cannot ignore, and it is one that we must understand if we are to understand the world in which we live.

... ..
... ..

37394

MARIE ANN JELLEMA,
Appellant,

v.

ALFRED ROY HULBERT,
Appellee.

18 #
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

277 I.A. 612²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

In an action brought by Marie Ann Jellema, plaintiff, against Alfred Roy Hulbert, defendant, to recover \$3,058.99, the amount of a check drawn by him to plaintiff's order, the court, trying the case without a jury, found the issues against plaintiff and entered judgment for defendant. This appeal followed.

The undisputed evidence disclosed that defendant, an attorney, was retained by plaintiff on a contingent fee basis of one third of the amount recovered to prosecute her action growing out of personal injuries sustained by her as a result of an automobile accident, which occurred at or near Chicago Heights, Cook county; that a judgment was entered in that cause in the Circuit court of Cook county for \$8,000 in favor of plaintiff and against the defendants, who were all residents of the state of Michigan; that the defendant in that cause, who was the owner of the automobile, carried public liability insurance to the extent of \$5,000 under a policy issued by the Detroit Automobile Insurance Exchange; that, with plaintiff's consent, defendant in this cause retained Black & Black, a firm of attorneys in Detroit, Michigan, to assist in collecting the judgment; that, it appearing that the collection of the judgment in full was improbable, plaintiff authorized defendant to accept \$5,027.10 in complete satisfaction

of the judgment and costs; that on or about June 20, 1932, knowing that a remittance was forthcoming from the Detroit Insurance Company, through Black & Black, plaintiff and defendant had an accounting and agreed that plaintiff was to receive \$3,058.99 from the proceeds of the remittance; that defendant drew up a written statement to that effect; that this statement, however, did not take into account certain hospital and doctor bills owed by plaintiff; that June 20, 1932, "close to the noon hour," defendant received a letter from Black & Black enclosing two drafts drawn on Detroit banks, totaling \$4,513.19, which represented the amount of the settlement less the fees of the Detroit attorneys; that June 21, 1932, defendant deposited the Detroit drafts for collection in his personal checking account in the Chicago Bank of Commerce (hereinafter referred to as the Bank), which was thereafter closed by the auditor of public accounts and did not open for business June 25, 1932; that prior to its closing defendant was not advised by the bank whether or not the Detroit drafts had been collected by it; that he made no inquiry of the bank as to whether it had collected the drafts inasmuch as he had an arrangement with the bank whereby over a period of years it invariably notified him as to its collection of drafts deposited by him, which were drawn on out of town banks and accepted by it for collection only; that the Detroit drafts were collected by the bank; and that June 24, 1932, defendant wrote the following letter to plaintiff:

"Miss Marie Ann Jellema,
331 West 110th Street,
Chicago, Illinois.

Dear Miss Jellema:

I am enclosing herewith check for \$3,058.99, which is the balance due you out of the collection from Detroit, per statement which I gave you and your father the other day when you were in the office. Our understanding together was that you are to pay the hospital and doctor's bills yourself.

[illegible]

While the following is strictly none of my business, I feel impelled to suggest to you that you ought to make this deposit in one of the loop banks rather than in any of the outlying banks. I feel that as long as this hysteria is on you ought not to take chances with making a deposit of this size in any outlying bank. It may be all right, but as long as crazy depositors are running in and taking out their money as they are, the small banks will have more-or-less trouble, and this is money which ought not to be lost.

Respectfully yours,
A. C. Hulbert.

P. S. Just before this letter was due to be mailed, the bailiff of the Municipal Court came in and served me with a couple of summonses. One is the suit of Dr. Harnett and the other is the hospital suit against you, wherein I am summoned as a garnishee. I imagine that the doctor has gone to his own lawyer whose name appears on the back of these writs and brought a suit for some reason or other, perhaps figuring that you or your father were not going to pay their bills. At any rate, under the law I have got to hold up this fund until the cases brought by the doctor and the hospital are disposed of. I guess you and your father better come in to see me right away. I am enclosing the summonses so you will know what they are about. Bring them back with you when you come.
Hulbert."

It appeared that plaintiff's father, D. W. Jellema, acting in her behalf and as her agent, went to defendant's office Saturday, June 25, 1932, the day the bank failed to open, apparently in response to the request contained in defendant's letter of June 24, 1932. As to what transpired in Mr. Hulbert's office on the occasion of this visit D. W. Jellema testified in plaintiff's behalf: "Yes when I came there first, about, I would say, about ten o'clock, on his invitation, on the day before, on Thursday, possibly, he told me to come and get the check, because it was the check for Marie's account, and when I got there he was inside and I was sitting on the outside for a while and waited and waited, and finally he came out and he swung his hand above his head. Yes, he said, the bank was closed and all the money was gone. That is all the words he used to me. And, I waited a little while and I asked what that had to do with me or with the daughter. Well, he said, 'You can still try the check. You can have the check and see what you can do with it. If you get it over there before twelve o'clock, maybe the bank is open.' I took the check to the bank and could not get in. I could not. I

tried to get in, but I was going to see the trust officer who I knew very well. I knew Judge Peterson very well. If anyone could have got in there, if it was possible, but Judge Peterson was sick and he was not there."

Defendant testified in his own behalf: "Yes, sir. I was in Court all that week. There were runs on every bank in Chicago during that week. I got out of Court Friday noon and went over to the bank and talked to Mr. Edward Heinz, the vice president, and asked him in what condition the bank was and he said they had no runs and no trouble and was perfectly solvent and the thing was all right. I told him I had this account there for collection. While I was talking to Mr. Heinz, Mr. Cox, president of the bank, came in and we had a three cornered conversation and he had just come back from the Continental and said everything was sound as far as this bank was concerned, and there was no need to worry."

As to what transpired on the occasion of D. W. Jellema's visit to his office June 25, 1932, defendant testified: "He asked me about the check which I said I was enclosing but did not, and the notation about the garnishment summons having been served on me. I said, 'That is not all of our troubles. I was in the bank yesterday afternoon, at the noon hour and they told me everything was all right and I turned on my heel and walked out of the bank and went to Court this morning, Saturday morning, straight from the house instead of going to the office, and I have just arrived at the office a few minutes ago and my secretary advises me that the bank never opened this morning.' I said, 'This fund that arrived from Detroit contained Marie's money, money to pay the hospital and doctors and my attorney's fees and I am powerless to do anything about it until something happens.' Mr. Jellema said to me, 'Well, give me the check' - the check had already been written on the

24th, the day that letter was written - 'Give me the check, I have got enough political drag or influence, or I know somebody and I will get the money.' I said, 'I think the check is absolutely worthless now with the bank in the hands of a receiver or the state auditor, but if you want it all right.' I said, 'What about these other people?' He said, 'I will take care of the hospital and doctor on the garnishment.' I said, 'I do not think the check is worth anything because the bank is closed.' He said, 'Let me have it' and I gave it to him. It is the right amount * * * that was coming to Marie at the end of our litigation less, of course, the amount owed to the doctor and to the hospital."

Plaintiff contends that defendant, the drawer of the check in question, delivered it unconditionally to plaintiff in satisfaction of her claim against him; that the check was dishonored by the drawee bank; that presentment of the check for payment and notice of dishonor were excused; that, in any event, defendant has shown no loss occasioned through any delay in presentment and giving notice of dishonor; that defendant is, therefore, liable on his contract as the drawer of the check.

Defendant's theory is that the instrument in question was known by both parties to be absolutely worthless when delivered; that a check drawn on a bank which is not in existence or is in process of liquidation is not a check representing money, is not payable at sight or demand and is not a negotiable instrument; that plaintiff in order to recover must be a holder in due course; that she was not such a holder because she received the check with full and actual knowledge of the infirmity of the instrument, i.e., its worthlessness; that plaintiff knew that the check was not delivered to her in payment of money due her from defendant; that defendant was not guilty of negligence; and that they were jointly interested

in the fund in the bank by virtue of the written contract entered into by them, she having a two-thirds interest and he a one-third interest.

We can conceive of no theory under which defendant may be held liable to plaintiff for the amount of her claim in this cause except that he was negligent in depositing for collection the drafts on the Detroit banks or in distributing the proceeds thereof. The evidence is conclusive that he exercised due and proper diligence and caution in his endeavor to collect said drafts. While plaintiff states in her brief that she does not concede that defendant was not negligent, she urges that her claim is not based on his negligence, but rather upon his unconditional delivery of the check to her for a valid consideration.

A check is an unconditional order in writing drawn on a bank by its maker payable to another for the payment of a sum certain in money upon demand.

While defendant acted improvidently and unwisely in giving his check on a closed bank to plaintiff's father, we are of the opinion that his rights in this cause were not thereby prejudicially affected. It is clear to us that the instrument delivered was not, within the contemplation of the Negotiable Instruments Act, a check that was negotiable. The facts in this case refute the contention that, when the instrument in question was delivered upon the occasion of the visit of plaintiff's father to defendant's office June 25, 1932, a contract evidenced by a negotiable instrument, or, in fact, any contract, was entered into between the parties. The auditor of public accounts of the State of Illinois had taken charge of the bank's affairs for the purpose of liquidating same and did not permit the bank to open for business June 25, 1932. The purported check was not an unconditional order, but was turned over to

in the form of a letter to the President of the United States, dated 1941, and a letter to the President of the United States, dated 1942, both of which are attached to this report.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

the church as well as a valid contribution.

on the religious, but rather upon his own individual belief as

different was not religious, the subject was not a religious

While historical studies in her field, she was not for the

proper religious and a citizen in the movement to change the

It is in my opinion that the above information is correct and that the same should be used for the purpose of the report.

RECEIVED THE DIRECTOR GENERAL OF THE ARMY

[illegible][illegible]

THE SECRETARY OF THE ARMY, WASHINGTON, D. C.

in fact, the subject of the report is the "The
subject of the report is the "The
of the report is the "The

-10- 117

Source: *Journal of the American Statistical Association*, 1976, 71, 1, 1-11.

plaintiff's father because of his insistence that, through his vaunted "political drag or influence" or his connections with the bank or its officers, he might be able to secure the payment of the check. The check purported to be drawn upon the bank, but the bank was no longer in existence. It necessarily could not have been given for the payment of money, inasmuch as the closed bank could pay no money on it, and it certainly was not payable on sight or demand, because the closed bank could not pay it at all. It is, therefore, apparent that the instrument delivered to plaintiff's father June 25, 1932, was not a check as defined by the Negotiable Instruments Act.

The absence or failure of consideration is always a sufficient defense against one who is not a holder in due course. There is no evidence in the record that even tends to prove that there was any consideration for the delivery of the check. It is clear to us that defendant was under no legal obligation to pay plaintiff anything, either before or at the time he turned the check over to her father, except from the funds received by him as her attorney in her litigation growing out of the automobile accident heretofore referred to. When defendant signed the check June 24, 1932, he was warranted in anticipating that when it reached plaintiff the fund against which it was drawn would be available for its payment by the bank. The identical check signed by defendant June 24, 1932, and which he intended to forward to plaintiff with his letter of that date except for the service of the garnishee summonses on him, was given to her father Saturday June 25, 1932, but the situation had entirely changed. The bank had closed its doors, ceased to transact business and refused to honor checks drawn against the fund deposited by defendant or any other deposit. The record abundantly and convincingly demonstrates

plaintiff's father because of his indebtedness to him, and his
various "political" and "business" or his connections with the
bank on its officers, he might be able to secure the payment of
the check. The check is supposed to be given upon the bank, but
the bank was no longer in existence. It is reasonably certain that
it has been given for the payment of money, inasmuch as the check
bank could pay no money on it, and it contains the two words
no date or amount, because the check would not pay it at
all. It is, therefore, stated that the first check is given
to plaintiff's father June 25, 1933, and not a check as stated by
the defendant's witnesses.

The issue of failure of consideration is always a
question of fact against one who is not a holder in due course.
There is no evidence in the record that even tends to show that
there was any consideration for the delivery of the check. It is
clear to all that defendant was under no legal obligation to pay
plaintiff's check, either before or at the time he issued the
check over to her father, except from the mere receipt of him
as her attorney in her father's name out of the automobile
accident insurance policy for. Her father's check against the check
June 25, 1933, he was received in consideration of which it
was given plaintiff the bank check which is now being sought to
be cashed for the payment by the bank. The plaintiff's check is
by defendant June 25, 1933, and which he intended to cash for
plaintiff also his father's check for the payment of
the automobile insurance on it, and given to her father through
June 25, 1933, and the attorney had custody thereof. The bank
has closed its doors, refused to refund plaintiff's and refused to
return check which was against the bank deposited by defendant on any
other basis. The record shows only one conclusively dispositive

that no consideration was given for the issuance and delivery of the check, and, if plaintiff is not a holder in due course, such lack of consideration is a complete defense to this action.

What constitutes a holder in due course? A holder in due course is a holder who has taken the instrument under the following, among other conditions: "That he took it in good faith and for value and that at the time it was negotiated to him he had no notice of any infirmity in the instrument." Plaintiff's utter lack of good faith in demanding the check, and thereafter retaining it, is amply shown by the evidence. There is not a scintilla of evidence that defendant did not exercise the utmost good faith in all of his dealings with plaintiff. That defendant delivered the instrument absolutely without value or consideration from plaintiff is clear, and it is equally clear that at the time plaintiff's father received the check he had notice of all of its infirmities, including its worthlessness, because of the closing of the bank.

Section 56 of the Negotiable Instruments Act is as follows: "To constitute notice of an infirmity in the instrument * * * the person to whom it is negotiated must have had actual knowledge of the infirmity * * * or knowledge of such facts that his action in taking the instrument amounted to bad faith."

The record clearly shows that Jellema had actual knowledge of the infirmity in the instrument. The evidence of both himself and defendant shows that he was advised that the bank had closed and that, consequently, the check was worthless, but he insisted that the check be given to him and that he could secure its payment.

Jellema testified that, when he went to defendant's office on the morning the bank closed, defendant told him, "that the bank was closed and all the money was gone. You can still try the

check. You can have the check and see what you can do with it. If you can get it over there before 12 o'clock maybe the bank is open." It is not only improbable but unbelievable that defendant, a practicing lawyer of many years experience, would advise Jellema in one breath that the bank was closed and in the next that it might be open, and that if he took the check to the bank before noontime he might be able to cash it.

The trial judge heard and saw the witnesses and unquestionably believed defendant's version of what transpired in his office on the occasion of Jellema's visit June 25, 1932. Mindful of this, as well as of the superior opportunity afforded the trial court to consider all of the evidence presented on the trial of this cause, and to determine the credibility of the witnesses, this court will not disturb the finding unless it is manifestly against the weight of the evidence, which is not the case here.

The conclusion is inescapable that it was not the intention of the parties that the check was given in payment of any legitimate claim that plaintiff had against defendant except out of the joint fund represented by the deposit of the drafts on the Detroit banks.

No citation of authorities is needed to support the propositions that the check in question was not delivered as a negotiable instrument within the contemplation of the Negotiable Instruments Act; that there was a total lack of consideration for the check; that it was worthless when it was given to plaintiff and that both parties were aware of its worthlessness; that the instrument purporting to be a check cannot under any circumstances be a negotiable instrument within the terms of the Act when drawn on a bank which is closed and no longer in existence, and so known to be by both the drawer and payee; that it could not have been

given for the payment of money, inasmuch as the closed bank could pay no money on it, and that it certainly was not payable on demand because the closed bank could not pay at all.

Plaintiff has urged many contentions and advanced a strained technical argument in support of same. However, in the view we take of this cause, we deem it unnecessary to discuss her contentions further. We have read and carefully considered plaintiff's cited authorities and find them inapplicable or readily distinguishable from the situation presented by the facts in this cause.

In our opinion the trial court was justified in its finding and judgment. For the reasons indicated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, F. J., and Scanlan, J., concur.

37404

LAURA M. JOHNSON,
Appellee,

v.

CENTRAL REPUBLIC TRUST
COMPANY, a corporation,
Appellant.

19 11
APPEAL FROM MUNICIPAL

COUNT OF CHICAGO.

277 I.A. 612³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for \$500 entered in the Municipal court in favor of plaintiff in a fourth class action tried by the court without a jury.

This suit was commenced March 1, 1933, and the amended statement of claim filed March 27, 1933, alleged that plaintiff's claim was for \$500 paid to defendant as the purchase price of a certain 6% first mortgage gold bond, dated September 1, 1927, secured by a trust deed on a building known as "The Hyde Park;" that the Chicago Trust Company (hereinafter referred to as the bank) was an Illinois corporation engaged in the several branches of the banking business, including a department known as the real estate loan division; that from July 1, 1929, defendant operated under the name "Chicago Trust Company," until July 25, 1931, when by reason of consolidation with the Central Trust Company it became known as the Central Republic Bank & Trust Company, and November 28, 1932, its corporate name was changed to the Central Republic Trust Company; that it held itself out to the public as a sound reliable investment house; that it solicited plaintiff to purchase from and through it a \$500 first mortgage real estate

bond known as "The Hyde Park," dated September 1, 1927, and maturing September 1, 1937; that prior to and at the time of such purchase the Chicago Trust Company falsely and fraudulently overvalued the real estate pledged as security for such bonds and misrepresented its rental value as well as the state of its occupancy; that, relying on these representations and believing them to be true, plaintiff paid \$500 to defendant for the aforesaid bond; that subsequently the mortgagors defaulted in the payment of this and other bonds of the issue; that, at and prior to the time the representations were made and the bond sold to plaintiff, defendant knew from its own appraisers that the property pledged as security was considerably less in value than represented; that the rental value was less and that there were vacancies in the building; and that, after learning of the false representations made by defendant as to the value of the security for the bonds, she tendered back her bond to defendant February 27, 1933, and demanded the return of her money, which defendant refused and still refuses to return.

Defendant's affidavit of merits asserts that the bond in question was purchased by plaintiff on or about November 28, 1927, or in any event prior to 1928, and that her action was barred by the statute of limitations.

In neither the original nor the amended statement of claim did plaintiff allege the date of purchase of the bond in controversy, but on the trial she testified that the purchase was made sometime in 1929. No question is raised on the pleadings.

Under the facts alleged and admitted or proven it must be conceded that if this action was not commenced within five years of the date of purchase of the bond, under the law of this state, it was barred by the statute of limitations. The date of purchase of the bond was the single ultimate fact to be determined.

Plaintiff, the only witness in her own behalf, produced

no documentary evidence as to her purchase of the Hyde Park bond in 1929. She admitted the purchase of a \$500 bond of the Hyde Park issue November 28, 1927, and testified that subsequently that bond was put up as collateral with other bonds to secure a loan of \$2,000 made by her from the bank. She then testified that at some indefinite time in 1929 she purchased another \$500 bond of the Hyde Park issue from Mr. Dunlap, sales manager of the real estate loan department of the bank, with whom she had transacted her business at the bank over a period of several years. She also testified that at the time of her purported purchase of the Hyde Park \$500 bond in 1929 her \$2,000 loan had neither matured nor been paid, and that the Hyde Park \$500 bond admittedly purchased by her November 28, 1927, and which was held by the bank as collateral for her loan, had not been returned to her at that time. Although she testified that thereafter she paid her \$2,000 loan at the bank, and Dunlap testified that when she did so all of the bonds held by the bank as collateral for the loan, including the Hyde Park \$500 bond purchased by her in 1927, were returned to her, she offered no satisfactory explanation of her ultimate disposition of that bond.

Dunlap, the only witness for defendant, testified positively that he sold no bond of the Hyde Park issue to plaintiff in 1929, and, after many technical objections had been raised, he was permitted to state that the Hyde Park bond sold by him to plaintiff November 28, 1927, bore serial number 150. Plaintiff deposited with defendant March 3, 1932, the Hyde Park bond which she claims to have purchased at some indefinite time in 1929, and it is significant that the certificate of deposit for that bond introduced in evidence bore the serial number 150.

Plaintiff testified that whenever she purchased a bond from the bank there was delivered to her along with the bond pur-

no documentary evidence as to the payment of the \$500 bond in 1937. The receipt for the purchase of a \$500 bond of the Hyde Park Loan November 22, 1937, and testified that subsequently the bond was put up as collateral with other bonds to secure a loan of \$2,000 made by her from the bank. The bank testified that at some indefinite time in 1939 she purchased another \$500 bond of the Hyde Park Loan from Mr. Wainwright, sales manager of the Hyde Park Loan department of the bank, with whom she had transacted her business at the bank over a period of several years. The bank testified that at the time of her purported purchase of the Hyde Park \$500 bond in 1939 her \$2,000 loan had neither matured nor been paid, and that the Hyde Park \$500 bond admittedly purchased by her November 22, 1937, and which was held by the bank as collateral for her loan, had not been returned to her at that time. It is in this testimony that therefrom was paid her \$2,000 loan at the bank, and Wainwright testified that when she did so all of the bonds held by the bank as collateral for the loan, including the Hyde Park \$500 bond purchased by her in 1937, were returned to her, she offered no satisfactory explanation of her witness statement of that fact. Wainwright, the only witness for defendant, testified positively that he sold no bond of the Hyde Park Loan to plaintiff in 1937, and after many technical objections had been waived, he was permitted to state that the Hyde Park bond sold to him to plaintiff November 22, 1937, bore serial number 180. Plaintiff requested this statement March 3, 1938, the Hyde Park bond which she claims to have purchased at some indefinite time in 1937, and it is significant that the certificate of deposit for that bond introduced in evidence bore the serial number 180. Plaintiff testified that whenever she purchased a bond from the bank there was delivered to her along with the bond the

chased a sales invoice showing the details of the transaction, amount of the bond, description or name of issue, serial number of bond, etc. She testified that at the time of the trial she did not have a sales invoice of her alleged purchase of the Hyde Park bond in 1929 nor of her 1927 purchase. The trial court improperly and erroneously refused to permit defendant's counsel to cross-examine her as to whether a sales invoice from defendant's files of the 1927 purchase, which bore the serial number 150, was either the original or a copy of the invoice received by her at the time of her 1927 purchase. If she answered in the affirmative, the necessity for preliminary proof as a foundation for the admission in evidence of this invoice would have been obviated. The sales memorandum of the 1927 purchase, which Dunlap testified was made in his handwriting at the time of that purchase, and which showed the serial number of the Hyde Park bond purchased by plaintiff at that time to be 150, was not permitted by the court to be used by Dunlap, even to refresh his recollection.

It is a well established principal of law that memoranda and entries made at or about the time of a transaction to which they relate, in the regular and usual course of business, and of the employment and duty of the person who made them, should be received in evidence as part of the res gestae.

Defendant was denied the right to present proper preliminary proof as a foundation for the introduction in evidence of the sales invoice or copy of same bearing on the 1927 transaction, and of Dunlap's sales memorandum of same. A careful examination of the record convinces us that both of defendant's exhibits which were excluded were material and competent as evidence bearing on the date of purchase.

It appeared that Dunlap personally wrote the sales

showed a sales invoice showing the details of the transaction
amount of the bond, description of bond at issue, serial number
of bond, etc. The fact that at the time of the trial the
did not have a sales invoice of the alleged purchase of the bond
with bond in 1948 nor of her 1957 purchase. The trial court
improperly and erroneously refused to admit the sales invoice
to cross-examine her as to whether a sales invoice from defendant's
files of the 1957 purchase, which bore the serial number 12, was
either the original or a copy of the invoice received by her as the
owner of her 1957 purchase. It was introduced in the alternative, the
necessity for its admission being shown by the evidence in
evidence of this invoice being not admitted. The sales
invoice of the 1957 purchase, which serial number was 12, is
his handwriting at the time of that purchase, and which shows the
serial number of the bond was 12, purchased by defendant at that
time to be 12, was not admitted by the court to be used by the
even to refute his recollection.
It is a well established principle of law that a person
and entries made at the time of a transaction is prima facie
evidence, in the absence of evidence to the contrary, and of the
competence and duty of the person who made them, serial 12-12-12
in evidence as part of the best evidence.
Defendant was denied the right to present proper preliminary
proof as a foundation for the introduction in evidence of the sales
invoice or copy of same bearing on the 1957 purchase, and of
defendant's sales invoice of same. A correct statement of the
record contains no fact of defendant's sales invoice which was
excluded from evidence and no evidence bearing on the sale
of purchase.
It appeared that such preliminary proof was the same

memorandum and that he supervised the preparation of the sales invoice of that transaction from his sales memorandum. The business of this great commercial country is transacted on records kept in the usual course of business and vouched for by a supervising officer, and such records ought to be competent evidence in a court of justice. (People v. Small, 319 Ill. 437, 477.) If the bond in controversy was purchased in 1927 this action is barred by the statute of limitations. If it was purchased in 1929 it is not.

In reference to the date of purchase of the bond the statements of the witnesses were absolutely irreconcilable, and to establish a preponderance every item of evidence fairly tending to corroborate either of them was more or less material.

It appeared that there was only one Hyde Park issue of bonds. The bond plaintiff claimed to have purchased in 1929, and which she deposited with the bank March 3, 1932, bore serial number 150. Dunlap testified that the bond he sold plaintiff in 1927, and which she admitted purchasing, bore the serial number 150. Dunlap's sales memorandum of the 1927 purchase and the sales invoice made from it, which both bore the serial number 150, were strongly corroborative, if not conclusive of the date of sale, and we are of the opinion that it was highly prejudicial to defendant to exclude them.

Satisfied that defendant was improperly restricted in the examination of the witnesses and that the trial court erred in its rulings on the documentary evidence offered by defendant, we are of the opinion that the ends of justice will be best served by a retrial of this cause.

For the reasons indicated the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

36993

MANDEL COHEN, Administrator of the
Estate of Liebie Cohen, deceased,

(Plaintiff) Defendant in Error,

v.

SAMUEL H. SHAYKIN and DAVID I. STONE,

(Defendants) Plaintiffs in Error.

WRIT OF ERROR TO

SUPERIOR COURT

COOK COUNTY.

277 I.A. 613

Opinion filed Oct. 28, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is a writ of error in this court to review the judgment entered in the Superior Court of Cook County in the case of Mandel Cohen, administrator of the estate of Liebie Cohen, deceased v. Samuel H. Shaykin and David I. Stone, defendants, which was brought to recover damages for personal injuries that resulted in the death of Liebie Cohen. The case was tried before the court with a jury, and a verdict was returned finding the defendants guilty and assessing the damages at \$10,000, and upon this verdict the court entered judgment.

This record is here upon a writ of error upon the application of Samuel H. Shaykin, defendant, which was not joined in by the co-defendant David I. Stone.

The amended declaration alleges, in substance, that on the 25th day of December, 1928, the defendant Stone, owned an automobile in which plaintiff's intestate was riding as a guest and which was being driven in an easterly direction on West Roosevelt Road in Cicero, Illinois, and that plaintiff's intestate was at all times in the exercise of due care for her own safety; that defendant Shaykin was driving his automobile in a westerly direction, both cars being driven on West Roosevelt Road at the time and place when the accident occurred; that both the defendants drove their respective automobiles so carelessly, negligently and improperly and at such an

STATE OF NEW YORK

IN SENATE

JANUARY 20, 1934

813 A. I. 813

REPORT OF THE

(1) (2) (3) (4) (5) (6) (7) (8) (9) (10)

v.

REPORT OF THE

(1) (2) (3) (4) (5) (6) (7) (8) (9) (10)

Opinion filed Oct. 23, 1934

THE SENATE

This is a bill of law to amend the

judicial system in the State of New York

of which the Senate is composed of the

v. Samuel A. Thayer and David I. Thayer,

to receive damages for personal injuries

of David Thayer. The case was tried

and a verdict was returned finding the

the damages at \$10,000, and also the

judgment.

This report is made in accordance with the

action of Samuel A. Thayer, defendant,

the co-defendant David I. Thayer.

The amount of the damages, in

the State of New York, in the

which the plaintiff is entitled to

which was being driven in an

State of New York, and that

times in the exercise of the

Thayer the driver of the

was being driven in an

the defendant's car; that both

automobiles are respectively

excessive rate of speed that they collided by reason of the combining and concurring negligence of the defendants, and thereby plaintiff's intestate was killed; that Mandel Cohen, the husband of the deceased, and David Cohen, H. S. Cohen and Bernard J. Cohen, sons, are next of kin.

The facts in substance are these: The automobile of the defendant Stone was being driven east on Roosevelt Road near the intersection of 54th Avenue, by one Levitsky, who was requested to drive it by defendant Stone. The defendant, Shaykin, was driving his automobile west on Roosevelt Road at the same time. One of them went to the left of the center of the road and collided with the other, and in the collision Liebie Cohen was killed.

On the 25th day of December, 1928, when the accident occurred, Mandel Cohen and his wife visited David H. Stone, the defendant, who was the brother-in-law of Mandel Cohen. Between 7 and 7:30 P. M. they left the home of Stone in Stone's car, and were driven by one Levitsky, a young man that worked for the concern by which Stone was employed. He was not a chauffeur and he did not appear as a witness in the case at the time of the trial. Liebie Cohen, the plaintiff's intestate was the sister of David I. Stone. The Stone automobile was a Chevrolet and in the car at the time were Levitsky, the driver, Mandel Cohen and Liebie Cohen, plaintiff's intestate, Mrs. Stone and a child. Mandel Cohen was in the seat with the driver. As we have already stated, the Stone car was being driven east on Roosevelt Road, and according to Mandel Cohen, the only witness for the plaintiff, the Stone car was being driven with the left wheels to the north of the north rail of the eastbound tracks. Mandel Cohen testified that he saw a large car with bright lights coming west and then there was a crash. There is also evidence that Samuel H. Shaykin, the defendant, was driving his Studebaker car west on Roosevelt Road

exclusive rate of speed (40) that resulted in reason of the condition
and connecting highway of the highway, the highway authority
interest was killed; the highway authority, the highway authority,
and David Cohen, M. A. Cohen and David A. Cohen, were not of

the

The facts in question are these: The highway of the
detention zone was being driven at an excessive speed (40)
interest of 40% speed, by the highway, and was increased in
drive it by excessive speed. The highway authority, the highway
authority was on the highway at the time of the accident. One of them was
to the fact of the highway of the highway, and was killed with the car, and
in the highway authority was killed.

On the 20th of September, 1944, when the highway
occurred, David Cohen and his wife (David Cohen and his wife)
and, who was the highway authority of the highway, was not of
P. E. they left the highway of the highway, and were killed by
one highway, a highway, a highway, and a highway of the highway
was employed. It was not a highway, and it was not a highway
in the case of the highway of the highway, the highway authority
interest in the highway of the highway. The highway authority was
a highway and in the highway of the highway, the highway
David Cohen and David Cohen, the highway authority, the highway
a highway. David Cohen was in the highway of the highway, the highway
already of the highway, the highway and the highway of the highway
road, and according to David Cohen, the highway authority, the highway
till, the highway of the highway, the highway authority, the highway
north of the highway of the highway of the highway. David Cohen was
till that he was a highway of the highway, the highway authority, the highway
there was a highway. There is also evidence that David A. Cohen,
the highway, the highway of the highway, the highway authority, the highway

and to the north of the street car tracks.

The occupants of the car at the time of the accident were Samuel H. Shaykin and his wife, Morris Shaykin his son, and Ruth Block. Upon the facts as to just how the collision took place, there is a conflict in the evidence. If the jury believed the story of the defendant Shaykin, they were justified in finding the defendant Stone guilty; if they believed the evidence offered by defendant Stone, then the accident occurred through the negligent driving of the car by Shaykin. From the evidence offered by the parties, the jury returned a verdict finding both of the defendants guilty and assessing damages.

The defendant Samuel H. Shaykin, contends that the evidence does not support the verdict as to both of the defendants in this case, and in support of his position points to the argument of plaintiff's counsel to the jury, which in substance is that only one of the defendants is liable, and argues that by the plaintiff's admission the judgment entered by the court as to both of the defendants is erroneous. The plaintiff answers this contention by citing Section 92, Par. 220 Chap. 110, of the Civil Practice Act, Cahill's Revised Statutes (1933) which is now the law and is controlling upon questions of procedure, in these words: and that the court on appeal has the jurisdiction and may

"Give any judgment, and make any order which ought to have been given or made, and make such other and further orders and grant such relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the issuance of execution, as the case may require."

In the consideration of the quoted portion of the Civil Practice Act, this court is inclined to the view that it never was the intention of the legislature in the passage of the section in question that the appellate court could usurp the function of a jury

and from the record determine the guilt of the parties to the action. Plaintiff's action is against two defendants, and the court is asked to function because of this section 93 of the Civil Practice Act, and enter an order and grant relief by the entry of a proper judgment. The evident intent of this act is to prevent the reversal of the judgment upon technicalities. Still it was never contemplated that the appellate court on appeal may act as a trier of facts. If so, this court would be obliged to act as a jury, and try the issues in each case and enter judgment, notwithstanding the witnesses did not appear before the court and their credibility could not be tested by the rules of law that govern the action of a jury. The question then addresses itself to this court: Did the admission of the plaintiff made before the court and jury bind the plaintiff so that he could by that act waive the right to contend that the judgment against the two defendants was a proper one? The plaintiff argues with some force in support of his position that Shaykin, being the only plaintiff in error, must assign and present to this court reversible error such as to entitle the defendant to have the judgment reversed as to himself; that it is no concern of Shaykin whether or not the evidence supports the verdict as to both defendants, and then proceeds to point to the evidence that the jury was justified in finding Shaykin guilty, together with his co-defendant, who is not here in this court to complain.

This court is not prepared to say that the evidence in the record does not indicate negligence in the operation of the Shaykin car. Therefore, was it reversible error to enter judgment upon the verdict of the jury against the defendants? There is evidence indicating negligent operation by Shaykin of his automobile at the time and place in question. In trying to avoid a hole in the pavement he turned to the center of the road, and as a result of the collision

[illegible]

plaintiff's intestate died from the injuries sustained.

Assuming that only one of the defendants was guilty of negligent operation of the car, and that the verdict of the jury was based upon the negligence of Shaykin, could this defendant take advantage of the failure of the evidence to establish the guilt of the co-defendant Stone? We believe not. Stone did not join with his co-defendant, and is not before this court making a complaint regarding the record. Shaykin is the only person complaining of the action of the trial court in the entry of the judgment, and the general rule is that the defendant who is the only party prosecuting the writ of error is only concerned whether the evidence supports the verdict against him. Meyer v. Surkin, 262 Ill. App. 83.

The evidence indicates that the defendants in the operation of their respective automobiles, when passing each other in opposite directions on Roosevelt Road in Chicago, on the night in question, were running their automobiles on the street car tracks, and although there is a conflict in the evidence as to what the position of the cars was before and at the time of the collision, the jury could reasonably find that the defendants were guilty of the negligent operation of their cars so close to each other that they collided and caused the injury to the plaintiff's intestate. Such operation of the automobile being contemporaneous and continuous, the defendants are liable, and although one or the other might have prevented the injury, they together caused it. Springfield Consolidated Ry. Co. v. Puntenney, 101 Ill. App. 95.

One of the questions raised by the defendant is that the declaration failed to allege that the heirs were in the exercise of care for the safety of the plaintiff's intestate at and before the time of the collision. The fact is that the amended declaration contains this allegation:

of the witness's testimony from the injuries sustained.

Assuming that only one of the defendants was guilty of

negligent operation of the car, and that the victim of the injury was

based upon the negligence of the driver, would this defendant take

advantage of the failure of the witness to establish the guilt

of the co-defendant? No, we believe not. There is no such

with his co-defendant, and it is not before this court as a complaint

regarding the record. Inquiry is for only person responsible of the

action of the trial court in its duty of the judgment, and the

General rule is that the defendant is the only party prosecuting

the writ of error is only concerned with the evidence reported

the verdict against him. Wheeler v. Wheeler, 203 Ill. App. 3d.

The evidence indicates that the defendants in the operation

of their respective automobiles, when passing each other in opposite

directions on a narrow road in Chicago, on the night in question,

were passing their automobiles on the street car tracks, and although

there is a conflict in the evidence as to what the position of the

were was before and at the time of the collision, the jury could

reasonably find that the defendant was guilty of the negligent

operation of their cars as above so much when they collided and

caused the injury to the plaintiff's property. People v. People, 203 Ill. App. 3d.

the two could have continued on and continued, the defendant

was liable, and although one of the cars might have occurred the

injury, they together caused it. People v. People, 203 Ill. App. 3d.

People v. People, 203 Ill. App. 3d.

One of the questions raised by the defendant is that the

defendant failed to allege that the injury was in the presence of

and for the safety of the plaintiff's interest as was before the

time of the collision. The fact is that the accident occurred

concerning this allegation:

"And the plaintiff avers, that the death of his said intestate was caused by the negligence of the said defendants and without any negligence upon the part of plaintiff's intestate or any of her heirs at law and next of kin."

This allegation was also contained in somewhat the same language in the original declaration. The allegations to which we have referred completely dispose of defendant's question.

One of the instructions given for the plaintiff by the court is questioned. We have examined the language of the instruction, and it is our opinion that the giving of this instruction was fully justified by the facts.

Upon the question of excessive damages, we are unable to agree that, although fifty-five years of age, the life of the deceased was of very little value. Her expectancy of life according to the life tables is 18.35 years. There is evidence that Mandel Cohen, husband of the deceased, was fifty-seven years of age at the time of the death of his wife; that there were living at the time she died three sons, David Cohen, thirty-seven years of age, married and not living at home, Harry S., thirty-four years of age, and Bernard G., the youngest, were unmarried and living with their parents at 3939 Gladys Avenue, Chicago, Mrs. Cohen was a healthy woman and was keeping house for her family, and doing the work necessary to maintain the home, with the assistance of a woman who did the laundry work.

The Supreme Court in the case of McFarlane v. Chicago City Ry. Co., 288 Ill. 476, clearly expressed what may reasonably be expected by the next of kin from the continuance of the life of the deceased, and said:

"In every action of this character 'the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death.' (Hurd's Stat. Chap. 70 sec. 2.) There is no rule by which the pecuniary loss can be exactly determined, and the jury must therefore calculate the damages with reference to a reasonable expectation of benefit from the continuance of the

life. These children might reasonably expect in many ways to derive pecuniary benefit from the continued life of the intestate. It is not required that the evidence shall afford data from which the extent of the pecuniary loss can be ascertained with certainty. Clearly, one of the elements of pecuniary loss is the personal service of deceased."

The record does not disclose that the jury was influenced by passion or prejudice in fixing the amount of the verdict at \$10,000, and it is sustained by the evidence.

Judgment will be affirmed.

JUDGMENT AFFIRMED.

HALL AND WILSON, JJ. CONCUR.

111. These findings are necessarily based on the fact
to which testimony was given and the evidence in the
case. It is not necessary that the witness shall
state that there was any intent to do anything
or anything with anything. It is only necessary
of something that is the purpose of the evidence.

The record does not disclose that the jury was instructed

by reading the evidence in finding the amount of the verdict of

\$10,000, and it is insisted by the witness.

Witness will be allowed.

Witness will be allowed.

Will the witness be allowed.

37012

FRANK JOSEPH MASON, Administrator of
the Estate of Katherine Mason, Deceased,

Appellee,

v.

ISRAEL GOLDMAN,

Appellant..

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

277 I.A. 613²

Opinion filed Oct. 25, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for \$3,500, entered in the Superior Court of Cook County, in an action brought under an act entitled "Injuries (to the person)," Ch. 70, Cahill's Ill. Rev. Stats., by the plaintiff as Administrator of the Estate of Katherine Mason, Deceased, against the defendant for wrongfully causing the death of Katherine Mason, as the result of a collision between the automobile driven by the plaintiff, in which Katherine Mason was a passenger, and the automobile driven by the defendant.

There was a trial before the court with a jury, and upon a verdict finding the defendant guilty and assessing damages, the above judgment was entered.

The declaration contains four counts. The first three counts allege, in substance, that on the 29th day of October, 1931, plaintiff's intestate was riding in a certain automobile at or near the intersection of Western Boulevard and 47th street, both being public highways within the corporate limits of the City of Chicago, in the County of Cook, and State of Illinois; that at the time of the accident, intestate was in the exercise of due care, and that the defendant was in possession of and operating a certain automobile upon Western Boulevard in such a careless and negligent manner that

THE STATE OF ILLINOIS,)
COUNTY OF COOK,)
ss.)
I,)
Clerk of said Court, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files of said Court.

18222 GULCHMAN

18222 GULCHMAN

Opinion filed Oct. 23, 1934

MR. PRESIDENT JUSTICE GIBBS and the other of the court.
This is an appeal by the defendant from a judgment for
\$3,500, entered in the Circuit Court of Cook County, in an action
brought under an act entitled "Chapter (to the person)," Ch. 70,
Official Ill. Rev. Stat., by the plaintiff as administrator of the
Estate of Katherine Mason, deceased, against the defendant for
wrongfully causing the death of Katherine Mason, as the result of a
collision between the automobile driven by the defendant, in which
Katherine Mason was a passenger, and the automobile driven by the
defendant.

There was a trial before the court with a jury, and upon
a verdict finding the defendant guilty and assessing damages, the
above judgment was entered.

The declaration contains four counts. The first count
states a charge, in substance, that on the 20th day of October, 1931,
plaintiff's intestate was riding in a certain automobile as he went
the intersection of West 1st Avenue and 7th Street, North Branch
Public Highway within the corporate limits of the City of Chicago,
in the County of Cook, and State of Illinois; that at the time of
the accident, intestate was in the driver's seat of the car, and that the
defendant was in possession of and operating a certain automobile
when contact occurred in such a manner and negligent manner that

the same was caused to run into the automobile in which the plaintiff's intestate was riding, and as a result of the carelessness and negligence of the defendant, plaintiff's intestate was thrown violently against the automobile, and sustained fatal injuries, by reason whereof she died on October 31, 1931.

Then follows the averment that the intestate left surviving her heirs at law and next of kin.

The fourth count alleges willful, wanton and malicious operation of the automobile by the defendant. This count was withdrawn by the plaintiff.

The defendant filed a plea of the general issue, and a special plea of non-ownership and control of the automobile in question.

The facts are, in substance, that the collision occurred at the intersection of Western Boulevard and 47th street between the automobiles of the plaintiff and the defendant on October 29, 1931, when plaintiff was driving north in the center lane of the northbound drive on Western Boulevard and making a left turn in the intersection at 47th street and across the southbound drive on Western Boulevard upon which the defendant was approaching the intersection from the north on plaintiff's right. Plaintiff was driving his own car, and his mother, Katherine Mason, was a passenger.

There is conflict in the evidence as to how the collision occurred, and it is important that this court pass upon the question of negligence of the defendant, or contributory negligence of the plaintiff, but for the reason that we have determined to reverse the judgment and remand the cause upon other grounds, it will not be necessary to pass upon the facts on the questions raised.

The defendant maintains that the Injuries Act, under

the case was caused to run into the automobile in which the plaintiff's automobile was riding, and as a result of the collision and negligence of the defendant, plaintiff's automobile was thrown violently against the automobile, and sustained fatal injuries, by reason whereof she died on October 11, 1931.

Then follows the averment that the plaintiff is surviving her heirs at law and next of kin, and that the plaintiff's fourth count alleges willful, wanton and malicious operation of the automobile by the defendant. This count was sustained by the plaintiff. The defendant filed a plea of the general issue, and a special plea of non-governance and control of the automobile in question.

The facts are, in substance, that the collision occurred at the intersection of Western Boulevard and 47th Street between the automobiles of the plaintiff and the defendant on October 11, 1931, when plaintiff was driving north in the south lane of the intersection drive on Western Boulevard and making a left turn in the intersection at 47th Street and across the defendant drive on Western Boulevard upon which the defendant was approaching the intersection from the north on plaintiff's right. Plaintiff was driving his own car, and his mother, Katherine Nelson, was a passenger.

There is conflict in the evidence as to how the collision occurred, and it is important that this point upon the question of negligence of the defendant, or contributory negligence of the plaintiff, but for the reasons that have been determined as adverse the plaintiff and against the count upon which recovery is sought, it will not be necessary to pass upon the question raised. The defendant maintains that the injuries to

which this action was brought, gives no right of action for a death occurring outside of the State, and that the evidence does not show that the accident happened in this State. He calls the Court's attention to the case of Rost v. Noble & Co., 316 Ill. 357, among other cases, as being decisive upon this question. The court said:

"The first contention of the plaintiff in error is that the evidence does not show that the factory where the deceased was employed was in Chicago or in the State of Illinois. The declaration alleged that it was situated in Chicago, Illinois, and this was a material averment, for the statute gives no right of action for a death from a wrongful act occurring out of the State. (Wall v. Chesapeake and Ohio Railway Co., 290 Ill. 227.) It was therefore necessary to prove the allegation. The testimony shows that the factory was at Fifty-ninth and Wallace streets, but there is no direct evidence that it was in Chicago or in Illinois. We cannot take judicial notice that fifty-ninth and Wallace streets is in Chicago. The defendant in error insists that there is evidence from which it may be fairly inferred that the factory was situated in Chicago, but it is unnecessary to determine this question, for since the judgment must be reversed, on a new trial the fact as to the situation of the factory can be fully shown.

It was necessary to allege in the declaration that the accident occurred in the State of Illinois, which is an essential element in the statement of a cause of action, and the omission to allege such material averment would not have been cured by verdict. Hartray v. Chicago Rys. Co., 290 Ill. 85, Wall v. C. & O. Ry. Co., 290 Ill. 227-230. It would appear from the authorities quoted that failure of the plaintiff in this case to prove the accident happened in Illinois, although averred in the declaration, would not sustain the verdict of the jury.

The plaintiff's answer to this question is, that while no witness testified in so many words that 47th street and Western Boulevard were highways in the City of Chicago, County of Cook, and State of Illinois, there was sufficient evidence from which the jury could reasonably infer that the streets in question where the accident occurred were public highways in the State of Illinois.

We observe from an examination of the Court's opinion

which this action was brought, gives no right of action for a death occurring outside of the State, and that the evidence does not show that the accident happened in this State. He calls the Court's attention to the case of Post v. Noble & Co., 316 Ill. 337, among other cases, as being decisive upon this question. The court said:

"The first contention of the plaintiff in error is that the evidence does not show that the factory where the deceased was employed was in Chicago or in the State of Illinois. The declaration alleged that it was situated in Chicago, Illinois, and this was a material averment, for the statute gives no right of action for a death from a wrongful act occurring out of the State. (Ball v. The Chicago and North Western Ry. Co., 230 Ill. 287.) It was therefore necessary to prove the allegation. The testimony shows that the factory was at Fifty-ninth and Wallace streets, but there is no direct evidence that it was in Chicago or in Illinois. We cannot take judicial notice that Fifty-ninth and Wallace streets is in Chicago. The defendant in error insists that there is evidence from which it may be fairly inferred that the factory was situated in Chicago, but it is unnecessary to determine this question, for since the judgment must be reversed, on a new trial the fact as to the situation of the factory can be fully shown.

It was necessary to allege in the declaration that the accident occurred in the State of Illinois, which is an essential element in the statement of a cause of action, and the omission to allege such material averment would not have been cured by verdict. (Hartley v. Chicago Ry. Co., 230 Ill. 287, Ball v. C. & N. W. Ry. Co., 230 Ill. 287-288.) It would appear from the authorities quoted that failure of the plaintiff in this case to prove the accident happened in Illinois, although averred in the declaration, would not sustain the verdict of the jury.

The plaintiff's answer to this question is, that while no witness testified in so many words that 47th Street and Western Boulevard were highways in the City of Chicago, County of Cook, and State of Illinois, there was sufficient evidence from which the jury could reasonably infer that the streets in question where the accident occurred were public highways in the State of Illinois.

We observe from an examination of the Court's opinion

in the case of Rost v. Noble & Co., supra, that the court did not pass directly upon the question of whether it would be proper to consider the facts and draw the inference from the evidence that the accident in question occurred within the State of Illinois. We have, however, examined the record in this case to determine whether the jury was justified in drawing such an inference, and find no evidence, except the testimony of the doctor who treated the injured person before her death, that he lived at 6721 Merrill avenue, Chicago. None of the witnesses located the place of the accident as being in the State of Illinois, and from the facts, an inference could not be drawn by the jury such as would sustain their verdict.

The Supreme Court has established the rule of law quoted in this opinion, and we are obliged to apply the rule and send this case back for a new trial, in order that upon such retrial the place of the accident may be clearly established.

The fact is called to our attention that upon the trial, during the examination of a witness, the plaintiff, in the presence of the jury, made a statement which would imply a threat, to which statement the Court's attention was called. It also appears that during the course of the argument before the jury by the attorney for the defendant, a daughter and next of kin of the deceased, acted in a manner apparently intended to show disgust with the argument of the attorney, by holding her nose and waving her hand at the jury. Such conduct is not proper, and we will assume that on a retrial of the case there will be no recurrence of behavior of this character.

Other points are raised, but we do not believe it necessary to consider them at this time.

For the reasons indicated in this opinion, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WILSON and HALL, JJ. CONCUR.

in the case of State v. Smith, 100 Ill. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

37025

THOMAS HIRSCH,

Appellee,

v.

GUY A. RICHARDSON, as Receiver of
CHICAGO RAILWAYS COMPANY, a
corporation,

Appellant.

23
17
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

277 1.A. 613³

Opinion filed Oct. 23, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This suit was instituted by the plaintiff in the Circuit Court of Cook County, to recover damages from the defendants for personal injuries sustained on the morning of September 17, 1930, by reason of being struck by the overhang of a street car platform as it turned from Monterey street into Vincennes avenue, in Chicago, Illinois. The case was submitted to a jury on the counts contained in the declaration and a plea of the general issue. A verdict was returned in favor of the plaintiff assessing his damages at \$5,000. Upon this verdict the trial court entered judgment, and from the judgment the defendants appeal to this court.

The first count of the declaration alleges in substance that the plaintiff was lawfully and rightfully along and upon Monterey street at the intersection of Vincennes Avenue; that the defendants were operating a street car on Monterey street at the intersection, and did then and there negligently, carelessly and improperly manage and control the vehicle, and as a result the street car collided with and hit the person of the plaintiff and he was injured.

The second count alleges that the defendants are the owners of and operated the cars on the street in question, and plaintiff having alighted from a northbound Vincennes Avenue car at Monterey

MONTY CALON

15

[illegible]

... and the ...

[illegible][illegible]

The record must show that the person is a citizen of the United States.

street, where the Vincennes Avenue car line terminates, was about to board the street car on Monterey street to continue north on Vincennes avenue, using due care and caution for his own safety, when the agents of the defendants then and there negligently, carelessly and improperly, managed, controlled, drove, and operated said vehicle, and as a result thereof the rear end of the said street car struck the plaintiff as the car made the turn, and plaintiff was thrown to the street and against the ground, and was then and there injured.

The third count differs from the second count in that it alleges that the defendants, through their agents, started the car before the plaintiff could board the same.

The fourth count alleges, in part, that the defendants negligently operated the street car, turned left to go north on Vincennes avenue without notice to plaintiff, and the plaintiff was injured.

From the facts as they appear in evidence, the plaintiff rode north on a Vincennes Avenue car to its terminus at Monterey street, and upon alighting walked to the car that was on Monterey street, with other persons, to a point where the street car-facing east- was standing at its regular stopping place, and before the plaintiff could board the car, it started and made a turn to go north on Vincennes Avenue, and the rear platform began to swing as the car proceeded around the curve, and in turning, the overhang of the car was near the curb of the street, near a news stand located at the corner, and plaintiff was knocked down upon the ground and injured.

The plaintiff was 67 years of age at the time of the accident. He resided at 11733 Longwood Drive for a period of twelve years. He was engaged in operating a butcher shop at 7021 Halsted street. In order to get to his place of business from his home, he used what is known as the short line car on Vincennes Avenue to Monterey street. At

street, where the witness found her lying face down, and about
to reach the street on an empty street at a certain point on
Vincennes Avenue, seeing the car and shouting for his own safety, when
the driver of the automobile then in turn negligently, carelessly
and improperly, suddenly, controlled, drove, and operated said vehicle,
and as a result caused the rear end of the said street car to strike
the plaintiff as she was the last, and plaintiff was thrown
to the street and against the building, where she then and there injured.
The facts above stated from the second count in that it
alleges that the defendant, through their agent, ejected the car
before the plaintiff could board the same.

The fourth count alleges, in part, that the defendant
negligently operated the street car, turned left to go north on
Vincennes Avenue without notice to plaintiff, and the plaintiff was
injured.

From the facts as they appear in complaint, the plaintiff rode
north on a Vincennes Avenue car to its terminus at Westway street, and
upon alighting walked on the sidewalk toward Westway street, with
other persons, to a point where the street car-traveling east was standing
at the corner of Westway street, and where the plaintiff could board
the car, it started and made a turn to the north on Vincennes Avenue,
and the said plaintiff began to walk as the car proceeded around the
corner, and in turning, the rear end of the car ran over the curb of
the street, near a man named located at the corner, and plaintiff
was thrown down upon the ground and injured.

The plaintiff has 35 pages of affidavits at the time of the complaint.
He resides at 1115 Westway street in a period of twelve years. He
was engaged in operating a street car at 7001 Westway street. In
order to get to his place of business from his home, he must walk to

this point he took the Monterey street car, which turned at the intersection on Vincennes Avenue to go north.

In the discussion of the questions raised by the parties, it is well to have in mind the rules of law which govern acts both of the plaintiff and the defendant. The Company is not required to accept every person as a passenger on its cars, but it is the duty of the Company, when a person under proper circumstances presents himself for the purpose of becoming a passenger of a street car, to give him a reasonable opportunity to safely board the conveyance. In Garlinski v. Chicago City Ry. Co., 257 Ill. App. 414, the court said:

"The rule is well expressed in the opinion of the Supreme Court in the case of Klinck v. Chicago City Ry. Co. 262 Ill. 280. The court in its opinion said:

'While it is necessary to prove either an express or implied contract of carriage between the carrier and the alleged passenger, yet the act of the carrier in stopping a street car, or in bringing it almost to a stop, at a place where it is accustomed to receive and discharge passengers, is an implied invitation to persons intending to take passage thereon at that place to board the car, and the act of any such person attempting to board the car is an acceptance of the implied invitation and creates the relation of carrier and passenger. It is the duty of those in charge of the car to know whether or not the implied invitation has been accepted, and the carrier cannot escape liability by showing that its employees in charge of the car did not know that the person who has accepted the implied invitation intended to board the car.'

Defendants rely upon the case of Lavander v. Chicago City Ry. Co. 296 Ill. 284, as distinguishing the rule announced in Klinck v. Chicago City Ry. Co., supra. We cannot say, however, but that the rule announced in the Klinck case is adhered to in the Lavander case. In the latter case the court found that there was a sharp conflict in the evidence as to whether or not the plaintiff was at the time of the accident a passenger and held that, under such circumstances, it was improper for the trial court to instruct the jury to the effect that 'it is the duty of a street car company to use the highest degree of care and caution consistent with the practical operation of its road and the mode of conveyance adopted to provide for the safety and security of the plaintiff.' No such instruction is involved in the case at bar, nor does the plaintiff take the position that the defendants owed him the highest degree of care consistent with the practical operation of the road, but rather insists that the defendants owed him the duty of giving him a reasonable oppor-

this point he took the company's car, which turned at the intersection on Vine Street to go north.

In the discussion of the question raised by the parties, it is well to have in mind the rule of the common law that of the plaintiff and the defendant. The company is not required to accept every person as a passenger on its cars, but it is the duty of the company, when a person under proper circumstances presents himself for the purpose of obtaining passage on its street car, to give him a reasonable opportunity to safely board the conveyance.

In Garland v. Chicago City Ry. Co., 287 Ill. App. 2d, 400, the court

said:

"The rule is well expressed in the opinion of the Supreme Court in the case of Kline v. Chicago City Ry. Co., 283 Ill. 500. The court in its opinion said:

'While it is necessary to prove that an express or implied contract of carriage between the carrier and the alleged passenger, at the time of the accident in stopping a street car, or in driving it along to a stop, at a place where it is accustomed to receive and discharge passengers, is an implied invitation to persons intending to take passage thereon, that place to board the car, and the duty of any person attempting to board the car is an acceptance of the implied invitation and creation of the relation of carrier and passenger. It is the duty of those in charge of the car to know whether or not an implied invitation has been extended, and the carrier has the burden of proving that the person who has accepted the implied invitation attempted to board the car.'

Elementary duty was laid down in Harmon v. Chicago City Ry. Co., 283 Ill. 500, in affirming the rule announced in Kline v. Chicago City Ry. Co., supra. The court said, however, that the rule announced in Kline was not applied to the facts in the instant case. In the latter case the court found that there was a third occasion in the evidence as to whether or not the plaintiff was on the car at the time a passenger and said that, under such circumstances, it was improper for the trial court to find that the duty of the carrier was to stop the car at a street car company. The court said: 'It is the duty of a street car company to have its cars stop at the places designated on its route of operation, and to give the safety and security of the passengers. No such invitation is involved in the case at hand. Nor does the plaintiff have the burden of proving that the carrier had the highest degree of care consistent with the circumstances of the case, but rather that the plaintiff's duty of taking his seat on the car was not

tunity to board its train and become a passenger."

However, it is not negligence per se for the motorman of a street car to fail to stop at a usual stopping place to receive passengers, and a motorman may rightfully assume, in rounding a curve, that an adult person standing near the track will draw back to avoid injury, but the question of whether such person was guilty of contributory negligence is one of fact for the jury under proper instructions. Kelly v. Chicago City Ry. Co., 283 Ill. 640. In Griswold v. Chicago Rys. Co. 339 Ill. 94, a somewhat analogous case, the court in its opinion said:

"It was defendants' duty to furnish a safe place for passengers to alight and to exercise proper care for their safety immediately thereafter. (Chicago Terminal Transfer Railroad Co. v. Schmelling, 197 Ill. 619; Pennsylvania Co. v. McCaffery, 173 id. 169.) It should be remembered that when plaintiff alighted from the car on the west side there was a stream of automobile traffic between the safety zone near which she alighted and the west curb of Halsted street. It is argued that she might by stepping forward have avoided the maximum swing of the car outward in making the circle into Seventy-ninth street. That would be true provided it appeared she would not have moved into the line of the automobile traffic. All this was a question of fact for the jury. While the facts were different in Kelly v. Chicago City Railway Co. 283 Ill. 640, from this case, in principle the rule of liability in such cases as this is stated."

If the court could say that the plaintiff, as a matter of law, was guilty of contributory negligence, based upon the facts and circumstances in the case, and that no rational person would have acted as the injured person did at the time of the accident, then it was the duty of the court to instruct the jury to find the defendant not guilty.

In the instant case, however, there is evidence to the effect that the plaintiff tried to board the Monterey street car which had stopped to receive passengers; that plaintiff fell to the ground as a result of the movement of the car as it rounded the curve to proceed north of Vincennes Avenue, and fell about six feet from

...tunity to board the train and secure a passenger.
However, it is not negligence per se for the defendant of a
street car to fail to stop at a small stop sign when it reaches
passengers, and a defendant may rightfully assume, in rounding a
curve, that an adult person standing near the track will draw back
to avoid injury, but the question of whether such person was
guilty of contributory negligence is one of fact for the jury
under proper instructions. Kelly v. Chicago City Ry. Co., 283 Ill.
640. In Grifford v. Chicago City Ry. Co., 335 Ill. 34, a somewhat analo-

gous case, the court in its opinion said:
"It was defendant's duty to furnish a safe place for
passengers to alight and to exercise proper care for
their safety immediately thereafter. (Chicago Railway-
Transfer Railroad Co. v. Schellinger, 197 Ill. 619; Tennant v. Van Hook, 173 Ill. 103.) It should be remembered
that when plaintiff alighted from the car on the west side
there was a stream of automobile traffic between the safety
zone near which she alighted and the west curb of related
street. It is argued that she might by stepping forward
have avoided the maximum width of the car entering in making
the circle into Twenty-ninth street. That would be true
provided it appeared the car would not have moved into the line
of the automobile traffic. All this was a question of fact
for the jury. While the facts were different in Kelly v.
Chicago City Ry. Co., 283 Ill. 640, from this case, in
principle the rule of liability in such cases as this is
stated."

If the court could say that the plaintiff, as a matter of law,
was guilty of contributory negligence, based upon the facts and
circumstances in the case, and that no rational person could have
acted as the injured person did at the time of the accident, then
it was the duty of the court to instruct the jury to find the defendant not guilty.

In the instant case, however, there is evidence in the
effect that the plaintiff tried to board the Twenty-ninth street car which
had stopped to receive passengers; that plaintiff fell to the ground
as a result of the movement of the car as it rounded the curve to
proceed north of Vincennes Avenue, and fell about six feet from

where the news stand was located at the corner, and there is evidence by a witness for the plaintiff that the plaintiff stepped on the step of the Monterey car. This is in conflict with plaintiff's testimony, but it was a reasonable inference for the jury to draw, from the evidence that the motorman of the Monterey car had notice that passengers had alighted from the short line Vincennes Avenue car at its terminus and at that point were walking and running from that car to take the Monterey car. The motorman testified that he saw the short line car stop, and that he saw people alight and start west to the point where the Monterey car was standing. The motorman also testified that when he started the Monterey street car on the occasion of the accident the front end of the platform swung a little to the north, and the rear platform of the car swung a little to the south, and then the car straightened out on Vincennes Avenue.

Under the facts as they appear, it was the duty of the defendants, when the plaintiff presented himself for the purpose of becoming a passenger on the street car, to allow a reasonable opportunity for him to safely board the car. The question as to whether the plaintiff exercised reasonable care for his own safety at that time was one for the jury, and it was for the jury to determine as to whether the plaintiff by any act contributed to bring about the injury sustained by him.

In the opinion of the court, there is sufficient evidence in this record, from which the jury could determine whether the defendants negligently, carelessly and improperly drove and operated the street car as alleged in the declaration. It is the familiar rule that in actions of negligence if there is any evidence in the record from which, standing alone, the jury may reasonably find that a material averment of the declaration has been sustained in an

where the body was located at the corner, and there is evidence by a witness that the defendant was on the step of the car at the time of the shooting. This is in conflict with the testimony, but it was a reasonable inference for the jury to draw from the evidence that the defendant was on the car at the time the shooting occurred. The defendant had alighted from the car and was standing near its rear end at the time the shooting occurred. The defendant testified that he was on the car at the time of the shooting, and that he saw the car stop, and that he saw people alight and get out to the point where the shooting was taking place. The defendant also testified that when he started the car, it was on the occasion of the accident the front end of the car was facing a little to the north, and the rear portion of the car swung a little to the south, and then the car turned out on a little to the south, and then the car turned out on a little to the south.

Under the facts as they appear, it was the duty of the defendant, when the plaintiff presented himself for the purpose of becoming a passenger in the car, to take a reasonable care to insure safety for him as he was getting in. The defendant failed to do this, and the plaintiff recovered reasonable damages for his injury. It was the duty of the defendant to insure the plaintiff by his act of driving the car in such a manner as to insure his safety. The defendant failed to do this, and the plaintiff recovered damages for his injury.

In the opinion of the court, there is sufficient evidence in this record to show that the jury could reasonably find the defendant liable for the plaintiff's injury. The evidence is sufficient to show that the defendant was negligent, and that the plaintiff's injury was caused by the defendant's negligence. The jury was instructed to find the defendant liable for the plaintiff's injury, and the court's opinion is that the jury's verdict is supported by the evidence.

action against the defendant, a motion such as appears in this record by the defendant at the close of the plaintiff's case, and also at the close of all the evidence, is properly denied.

There was sufficient evidence heard by the jury to establish negligence on the part of the defendants in the operation of the car, but the evidence does not establish contributory negligence of the plaintiff in the manner in which he attempted to board the Monterey street car.

We are satisfied that the court was justified in overruling the motion for a new trial by the defendants, and in entering judgment on the verdict of the jury. The judgment, therefore, is affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

action against the defendant, a motion made is refused in this
respect by the defendant at the close of the plaintiff's case, and
also at the close of the defendant's case, is properly denied.
There was sufficient evidence to show that the

established negligence on the part of the defendant in the operation
of the car, but the evidence was not sufficient to establish negli-
gence of the plaintiff in the manner in which it attempted to pass
the contrary at least.

It was admitted that the court was justified in granting
the motion for a new trial of the defendant, and in entering judg-
ment on the verdict of the jury. The judgment, therefore, is affirmed.
JUDGMENT AFFIRMED.

VIBOR AND HALL, J. J. JUDGES.

37090

JAMES J. BARBOUR,

Appellant,

v.

LAMMERT AND MANN COMPANY, a
corporation,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

277 I.A. 613⁴

Opinion filed Oct. 23, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff appealed from a judgment entered in the Municipal Court of Chicago in favor of the defendant for costs. The plaintiff instituted suit and filed a statement of claim, by which the plaintiff sought to recover damages for \$975.00, occasioned by the defendant's removal of an oil heating equipment from the plaintiff's house located at Park Ridge, Illinois. The burner was installed in the furnace as a part of the equipment for heating purposes.

It further appears from the plaintiff's statement of claim that the defendant on September 15, 1932, without plaintiff's consent, wrongfully entered the dwelling house and wilfully broke and damaged the furnace and heating plant, which was a permanent fixture in said dwelling house, and damaged certain gas and oil pipes, and hot water pipes and conductors, and forcibly seized and carried away a certain oil burner and equipment, and the defendant converted the same to its own use.

The amount of the damages set forth in plaintiff's statement of claim is as hereinabove stated.

The defendant in its affidavit of merits denied ownership by the plaintiff of the property, or that the defendant on September 15, 1932, by its agent, broke and damaged the furnace and heating apparatus, and denied that the defendant converted to its own use

a certain oil burner and equipment.

It appears in the affidavit of merits as a part of the defense that J. G. Brand, on June 30, 1930, was in possession of the premises, and purchased from the defendant a certain automatic oil burner for installation in said premises; that J. G. Brand executed and delivered to the defendant his installment note for \$167 and also executed a sales contract, whereby the title to said oil burner was retained by the defendant until the conditions of the contract were performed; that after the execution of the contract a default occurred, and on September 15, 1932, with the knowledge of Brand, the defendant repossessed itself of the burner and equipment.

Trial was had upon the issues, and judgment was entered as above stated.

The evidence is to the effect that the plaintiff entered into a contract with J. G. Brand and wife, dated July 24, 1930, whereby the plaintiff sold the land and the building thereon, located in Park Ridge, Illinois, to Brand for the sum of \$13,415, payable in installments and subject to a mortgage of \$6,000. A payment of \$1700. was made by Brand on said contract, and as a part of said payment Brand was allowed \$500 to pay for the installation of an oil burner system in a Holland Furnace contained in the building. The oil burner system was furnished by the defendant upon the execution by Brand of a contract and notes, and was to be installed in the premises known as 1238 Cortland Street, Park Ridge, Illinois. This contract was dated June 20, 1930, which called for the installation by the defendant of a Lammert Number O Oil Burner, together with equipment, by July 10, 1930, for the sum of \$500, and a note was executed by Brand at the time of the execution of the contract for \$167, payable

a certain oil burner and equipment.

It appears in the record of title as a part of the

deed that J. E. Brand, on June 10, 1937, was in possession of the premises, and purchased from the defendant a certain automatic

oil burner for installation in said premises; and J. E. Brand

executed and delivered to the defendant a certain instrument for 1937

and also executed a sales contract, whereby the title to said oil

burner was retained by the defendant until the completion of the

contract now pending; that after the execution of the contract of

installment occurred, and on September 15, 1937, with the knowledge of

Brand, the defendant removed in all of the burner and equipment.

That was had upon the record, and judgment was entered

as above stated.

The evidence as to the facts that the plaintiff entered

into a contract with J. E. Brand and wife, dated July 10, 1937,

whereby the plaintiff sold the land and the building thereon, for the

in Cook County, Illinois, to Brand for the sum of \$15,000, payable in

installments and subject to a mortgage of \$5,000. A payment of

\$1,000, was made by Brand on said date, and no amount of said pay-

ment Brand was allowed \$200 to pay for the installation of an oil

burner system in a certain building contained in the building. The

oil burner system was furnished by the defendant upon the condition

by Brand of a contract and estate, was to be installed in the

premises known as 1234 Cottage Street, Cook County, Illinois. This

contract was dated June 10, 1937, which called for the installation

by the defendant of a certain automatic oil burner, together with equip-

ment, by July 10, 1937, for the sum of \$200, and a note was executed

by Brand at the time of the execution of the contract for \$100, payable

in three installments of \$55.67, on the 10th of each month, beginning on the 10th day of August, 1930.

The contract also provided that title to the oil burner and equipment should, at the defendant's option, remain in the seller (the defendant) until the entire purchase price was paid in cash, and that the seller might waive "its option to retain title without notice by filing claim for, or mechanic's lien or otherwise."

The oil burner equipment was delivered on the premises and installed by the defendant by connecting pipes from a 1,000 gallon fuel oil tank imbedded in the yard in front of the house, through the front basement wall, and the pipes were attached to the pumping apparatus, which was to be used to pump oil from the tank to the burner. The oil burner equipment was enclosed in the Holland Furnace in the basement of the building. Heat was generated when the burner was in operation and circulated up through the furnace and through the furnace stacks to registers in the various rooms on the first and second floors. The oil burner apparatus was controlled by a thermostat placed on the first floor of the building and connected by wires strung through the building to the burner in the basement. The thermostatic control was used to electrically operate the burner, and was governed by the temperature of the rooms as adjusted by the occupant of the dwelling.

Brand testified, in effect, that after the oil burner was installed and used for some time, he communicated with the defendant and advised that he was moving, and that he owed a balance which he could not pay; that he requested the defendant to remove the oil burner, and it was removed by defendant's superintendent by means of a Stillson wrench and a screw driver. The unit was disconnected from the oil supply pipes and the controls regulating the furnace and stack, as well as the wires attached to the thermostat control.

in first basement of B. B. Co. on the 10th day of August, 1900.

The contract also provided that the oil burner and
equipment should, at the contractor's option, remain in the building
(the defendant) until the first of January, 1901, and that the
defendant should give the notice to remove the same.

The oil burner was installed by connecting pipes from a tank
located in the first basement of the building to the front
basement of the building, and the pipes were connected to the
burner, which was to be used to heat the oil tank and the
water. The oil burner equipment was removed from the building
in the basement of the building, and was removed when the
oil tank was removed from the building and through the
front stairs to the first basement of the building and
second floor. The oil burner was the property of a third
party placed on the first floor of the building and removed by
the defendant. The oil burner was the property of the defendant.
The defendant was to be removed from the building and through the
front stairs to the first basement of the building and
second floor. The oil burner was the property of a third
party placed on the first floor of the building and removed by
the defendant. The oil burner was the property of the defendant.

It was testified, in evidence, that after the oil burner was
installed and used the same time, as mentioned in the contract
and agreed that the same was to be removed from the building
and that it was removed by the defendant, and that it was removed
from the building and through the front stairs to the first
basement of the building and second floor. The oil burner was
the property of a third party placed on the first floor of the
building and removed by the defendant. The oil burner was the
property of the defendant.

The plaintiff contends that the oil burner formed a part of the original construction of the dwelling house, and was to be used in its operation to generate and supply heat through the medium of the furnace, and as such was a permanent fixture attached to the real estate and could not be detached from the premises without the consent of the person vested with title to and ownership of the real estate.

Plaintiff by the execution of the contract of sale with Brand, consented to the installation of the oil burner on the premises by Brand, and by the execution of the contract he was chargeable with the acts of Brand,

The oil burner and its equipment were installed by the defendant upon the terms of the contract, and the apparatus was in operation in the building for a period of about two years, when the same was removed.

There are many decisions of courts of last resort upon the question of when a fixture attached to the realty may be removed by the acting parties. In this state the Supreme Court established the rule in the case of Sword v. Low, 122 Ill. 487, in these words:

"There seems to be great unanimity in the authorities; that things personal in their nature may retain their character of personalty by the express agreement of the parties, although attached to the realty in such manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury to the article itself, or to the freehold. It is not held that parties may, by contract, make personal property real or personal at will, but that where an article personal in its nature is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, or if, from the circumstances attending, it is evident or may be presumed that such was the intention of the parties, it will be held to have retained its personal character. Ford v. Cobb, 20 N. Y. 344; Eaves v. Estes, 10 Kan. 314; Coleman v. Lewis, 27 Pa. 391; Hunt v. Bay State Iron Co. 97 Mass. 279; Richardson v. Copeland, 6 Gray, 536; Haven v. Emory, 33 N. H. 66."

[illegible]

1. The first step is to identify the problem or question that needs to be answered.

10. The above information was obtained from the records of the Bureau of the Federal Bureau of Investigation, and is being furnished to you for your information.

The old owner of the apartment was installed by the defendant upon the terms of the contract, and the apartment was in operation in the building for a period of about two years, when the same was removed.

There are many instances of letters of love; and upon the question of when a letter is to be written, the writer is advised by the acting partner. In this regard the writer is advised: the rule in the case of letters of love, in these words:

1. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).
 2. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).
 3. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).
 4. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).
 5. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).
 6. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).
 7. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).
 8. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).
 9. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).
 10. United States v. Egan, 395 U.S. 189, 20 L. Ed. 2d 175, 80 S. Ct. 1498 (1969).

In this case Brand and the defendant company entered into a contract for the installment of the oil burner hereinbefore described. The contract specifies the conditions upon which the defendant placed the burner in the premises, and is binding upon the parties. It is claimed that the intention of the parties to the contract was that the burner should be treated as personalty, title to remain in the defendant until the burner was paid for, unless payment was waived by the filing of a claim for mechanics' lien by the defendant company. This contract between Brand and the defendant is within the rule of law announced in the case of Sword v. Low, supra, and even if the burner was attached to the realty, still the intention of the parties, as expressed in the contract, will govern, and the property will retain its personal character.

While the general rule is that a mechanics' lien cannot be maintained upon property where the title holder is not a party to a contract for improvements, unless he stands by and with knowledge permits the improvements to be made upon his property, still the cases cited on the question of enforcement of a mechanics' lien will not be helpful upon the issues before us on this appeal.

The question then resolves itself into, did the plaintiff, not being a party to the oil burner contract, stand by with knowledge that the burner was being installed by the defendant upon the plaintiff's property? The contract between the plaintiff and Brand for the purchase of the real estate from the plaintiff, title to which was to remain in the plaintiff until Brand had paid the purchase price, was based, in part, upon the allowance by the plaintiff to Brand of \$500 to pay for the installation of an oil burner. By the terms of this contract, the plaintiff not alone empowered Brand to install the burner, but also consented to its installation. The plaintiff, therefore, is properly chargeable with knowledge that Brand would contract for the burner. In order to carry out his part of the agreement, Brand did

[illegible]

enter into the contract heretofore referred to, and the burner was installed by the defendant in accordance with the terms of the contract, and remained in the premises until Brand was in default in payments, when he, while still in possession of the property, ordered the defendant to remove the burner.

Counsel for both sides have cited many authorities from this and other jurisdictions, but upon consideration, the question is usually one controlled by the intention of the parties in attaching fixtures to realty.

We believe, under the circumstances, the trial court was fully justified in entering the judgment from which this appeal was allowed, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

enter into the contract, it is, and the contract was
invalidated by the defendant in accordance with the terms of the
contract, and remained in the contract until it was
in payment, when he, while still in possession of the property,
ordered the defendant to return the money.

Contract for both sides being equally invalid
from this and other considerations, the contract was
questioned as being one controlled by the intention of the parties
in attaching themselves to it.

As before, under the circumstances, the contract was
fully justified in making the contract from the time it was
made, and the contract is accordingly valid.
The contract is valid.

Witness my hand, this 1st day of June, 1900.

37186

DAN DONAGHER,

Plaintiff in Error,

v.

MARY ESTHER CURLEY,

Defendant in Error.

WRIT OF ERROR TO

SUPERIOR COURT

COOK COUNTY.

277 I.A. 613⁵

Opinion filed Oct. 23, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in the Appellate Court by the plaintiff upon a writ of error to review a judgment entered by the court for the defendant in an action filed by the plaintiff against the defendant for the recovery of monies expended by him in the remodeling of a building located on Thome Avenue in Chicago, the title to which was in the defendant and her mother. Plaintiff also seeks to recover the money expended in the purchase of an engagement ring which was delivered to the defendant upon an agreement of marriage, and after which the defendant failed and refused to marry the plaintiff, although he was ready, and plaintiff seeks to recover the money so expended in contemplation of the marriage with the defendant.

The theory of the defendant is that the monies paid by the plaintiff were for the improvement and furnishing of defendant's home, and were voluntarily paid by the plaintiff as a gift and without any promise by the defendant to repay the plaintiff for the monies so expended; that plaintiff was guilty of a breach of said marriage promise, and refused to marry defendant, and that the engagement ring was a gift by the plaintiff to the defendant in contemplation of marriage between the plaintiff and the defendant, and not as a consideration for such marriage.

BYING

DAK. TERRITORY,

PLAINTIFF IN ERROR,

v.

THEYER & COMPANY,

DEFENDANT IN ERROR.

DOCK COURT,

387 A. 613

Opinion filed Oct. 28, 1934

MR. JUSTICE DUFFIN delivered the opinion of the court.

This case is in the nature of a writ of habeas corpus.

Upon a writ of habeas corpus, judgment was rendered for the defendant. In an action filed by the plaintiff against the defendant for the recovery of money expended by him in the removal

and of a building located on Town Square in Chicago, the title to which was in the defendant and his mother, the plaintiff also seeks to recover the money expended by the defendant in the removal of the building, which was delivered to the plaintiff under an agreement of written,

and after which the defendant failed to return to the plaintiff, although he was ready, and actually began to remove the money so expended in the construction of the building with the defendant.

The theory of the plaintiff is that the money paid by the plaintiff was for the improvement and removal of defendant's home, and that defendant is liable to the plaintiff for the money so expended; that defendant's failure to return the money so expended, and refusal to return defendant, and that the engagement was a gift of the building to the defendant, in consideration of services rendered and plaintiff and the defendant, and not as a consideration for each other.

The question involved is one of fact. The plaintiff and the defendant were the only witnesses heard by the court, without a jury, and the question is whether the finding of the court for the defendant was against the manifest weight of the evidence.

From the evidence it developed that the plaintiff was a police officer of the City of Chicago, and became acquainted with the defendant in the year 1914, at a boarding house operated by the defendant's aunts; that the plaintiff and the defendant from the time of their acquaintance were interested in each other; visited theatres together, had dinner engagements, and the plaintiff visited the defendant at her home, which was maintained by her mother. As a result of the visits they talked of marriage, and finally, in June, 1929, the parties entered into an agreement of marriage.

It is to be noted that the plaintiff and the defendant, after a period of about fifteen years of this association, became engaged and the date was fixed when the marriage was to be celebrated. This fact was announced, and there is evidence that the defendant prepared a trousseau, arranged for a bridesmaid, had been entertained in honor of the approaching marriage between the plaintiff and the defendant, and received wedding gifts from her friends.

It is not disputed that the plaintiff expended the money for the remodeling of the home owned by the defendant and her mother, which was done to make it convenient for the plaintiff and the defendant to reside in the same home with the defendant's mother, but there is a conflict as to what caused the breach that resulted in the failure of the parties to consummate the marriage contract.

The plaintiff, in addition to his salary as a police officer, had an income from certain investments and, from the evidence, it appears that the plaintiff wanted the date of the marriage postponed

[illegible]

because of his financial condition. As a result the wedding did not take place upon the agreed date, and from that time the plaintiff and the defendant drifted apart.

The defendant, in anticipation of marriage, resigned her position as a clinical historian at Hines Hospital and as organist at St. Peter's Church.

The court passed upon the facts and considered the evidence, and no doubt was impressed by the evidence of the defendant, and this court cannot say from the record that the judgment for the defendant was erroneously entered by the court.

We are of the opinion that the plaintiff did not establish his claim by a preponderance of the evidence, and that the judgment entered by the trial court is not against the manifest weight of the evidence as it appears in the record. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL AND WILSON, JJ. CONCUR.

because of his financial position. He would not have been able to take place with the other boys, and from that time the defendant and the defendant's father were.

The defendant, in consideration of money, was given the position as a clinical physician at the hospital and an apartment at St. Peter's Church.

The court found that the facts were established by evidence, and no doubt was expressed by the evidence of the defendant, and this court cannot say that the facts were the subject of the defendant's erroneous statement of the facts.

It is also to be noted that the defendant was not responsible for his claim by a representation of the facts, and that the defendant entered by the trial court is not against the evidence which is the evidence as it appears in the record. The defendant is responsible for the facts.

Respectfully submitted,

HALL AND HILSON, J.L. HILSON.

37207

PIONEER TRUST & SAVINGS BANK,

Defendant in Error,

v.

H. H. HERBST, Trading as H. H. Herbst
& Co.,

Plaintiff in Error.

26 277 I.A. 614¹
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Oct. 23, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This writ of error is directed to the Municipal Court of Chicago at the instigation of the defendant (plaintiff in error) to review the record wherein a judgment for \$750 was entered by the court in favor of the plaintiff (defendant in error).

The plaintiff instituted this suit in the Municipal Court of Chicago against the defendant to recover monies received by the defendant in the adjustment of certain fire losses suffered by the Miller Lumber and Supply Company, a corporation, which monies were received upon certain policies of insurance assigned by the Miller Lumber and Supply Company to the plaintiff, in words and figures as follows:

"For Value Received, the undersigned, Miller Lumber & Supply Co., an Illinois corporation, hereby sells, assigns, and transfers unto Pioneer Trust & Savings Bank, all its right, title and interest in and to all monies that may be due us by reason of a settlement of the fire loss which occurred October, 1930, at 3558 W. Grand Avenue, including any claim which we might have, either against the insurance companies issuing the policies by virtue of which said claim arises, and including also all monies due the undersigned from H. H. Herbst & Co., insurance adjusters; and we hereby authorize the said Pioneer Trust & Savings Bank to give good and sufficient receipts for any monies so received by them.

In Witness Whereof, said corporation has hereunto set its hand and seal by its President and Secretary this Twenty-eighth (28th) day of May, A. D. 1931.

MILLER LUMBER & SUPPLY COMPANY,
By Max Cohen,
President."

and a certain written agreement, a part of said assignment, and signed by the defendant in the instant case, in words and figures as follows:

"The undersigned, H. H. Herbst & Co., insurance adjusters, hereby acknowledges receipt of a copy of the foregoing assignment, and agrees that they will deliver to Pioneer Trust & Savings Bank any and all monies due Miller Lumber & Supply Company by reason of said fire loss, excluding, however, from any amount so delivered to Pioneer Trust & Savings Bank the sum of Six Thousand Dollars (\$6,000.00) which has been loaned or advanced to Miller Lumber & Supply Company by the undersigned, and, excluding also any fees or charges made for services rendered by the undersigned.

H. H. Herbst & Co.
By H. H. Herbst."

The evidence in the trial of the above case was heard by the court, without a jury, from which it appears that the plaintiff was a creditor of the Lumber Company to the extent of \$12,000. The plaintiff desired to enforce the collection of this amount, evidenced by a note, and in order to avoid such action, Max Cohen, president of the Miller Lumber & Supply Company, accompanied by the defendant, called at the bank and an arrangement was entered into, in writing, whereby the Lumber Company assigned to the bank the proceeds of the fire loss settlement, if any is made, and the funds so received to be distributed between the parties in the manner stated in the assignment and the written agreement attached thereto.

The record further discloses that suits were instituted on the insurance policies by the Lumber Company through its attorney, and the defendant advanced \$175 for court costs. These cases were settled for \$7,500.

There is evidence that the sum received by the defendant was accounted for by deducting the \$6,000 advanced by him, to the Lumber Company, \$750 for his fees as insurance adjuster, and the remainder retained by the defendant for court costs and auditor's charges paid by him, which amounted to \$685, leaving a balance of \$65 still remaining to be distributed.

At the conclusion of the hearing, judgment was entered for the plaintiff for the sum above mentioned.

The question raised by the defendant is that the trial court erred ^{not} in construing the agreement of the defendant to mean that he was to deduct from the monies recovered upon the policies the amount he advanced to the Lumber Company, \$750 for fees as an adjuster, and the balance of \$750 which he dispersed for court costs and auditor's fees. The controversy is regarding the disposition of the balance remaining after the deductions allowed by the court. The significant language used by the parties at the time the defendant signed the agreement, seems clear when it is considered that the defendant and the plaintiff were interested in the recovery of the amount due upon the insurance policies, so they could apply the amount so received toward the settlement of their claims in full, or at least in part. Having this in mind it was surely the intention of the parties from the wording of the agreement signed by the defendant providing for certain distribution of the funds received in settlement of the fire loss, that

" * * * from any amount so delivered to Pioneer Trust & Savings Bank the sum of Six Thousand Dollars (\$6,000.00) which has been loaned or advanced to Miller Lumber & Supply Company by the undersigned, and, excluding also any fees or charges made for services rendered by the undersigned."

This language is not in accord with the construction of the contract contended for by the defendant. The monies advanced for attorney's and auditor's fees were not for services rendered by the defendant.

The evidence of the parties does not indicate that the amount for expenses already advanced by the defendant was mentioned or included in the agreement at the time of the assignment, and when the agreements were prepared and signed at the bank. It is reasonable to conclude that if the defendant advanced sums which he regarded as part of the transaction, he would have insisted that the additional

sums now claimed would be included as a proper deduction.

From the facts it would appear that the court did not err in the entry of the judgment for the plaintiff for the sum of \$750, which amount was retained by the defendant in violation of his contract. The judgment will be affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

These new colored rails are included in a recent addition.
 From the facts it would appear that the total all day
 out in the early of the morning for the day. The day of
 1930, which means the end of the year in which it
 his contract. The company is in a position
 to meet the demand.

WINSTON AND SONS, LTD. LONDON.

37230

J. M. DIXON

(Plaintiff) Appellant,

v.

GENERAL REGISTER CORPORATION, a
Corporation.

(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

277 I.A. 614²

Opinion filed Oct. 28, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff appeals from a judgment entered by the court at the conclusion of a hearing upon the issues made for the recovery of certain monies in an attachment proceeding, and in which a garnishee summons was issued. Upon the hearing the court found the issues for the defendant in the attachment proceeding and entered judgment for the defendant and discharged the garnishee.

This action is based upon plaintiff's statement of claim for the recovery of certain commissions alleged to be due from the defendant upon an oral agreement in the sum of \$7,588.52.

It is alleged in the statement of claim that on November 14, 1932, defendant employed the plaintiff as defendant's Western Division Manager for a period of one year, and agreed to pay plaintiff as a salary \$50 a week, expenses, and on all business transacted in said division, except "World's Fair" business, which was to be handled by the defendant, a commission of ten per cent when the business exceeded \$3,000 per month; fifteen per cent when the amount exceeded \$4,000 per month, and twenty per cent when the amount exceeded \$5,000 per month; that thereafter defendant not having procured the "World's Fair" business, instructed the defendant to devote his entire efforts to procuring said business, and in consideration of such efforts, defendant promised to pay plaintiff a commission as aforesaid on such business so obtained; that the plaintiff obtained the "World's

Fair" business, which amounted to \$30,000; that his commissions, including said business, amounted to the sum of \$7,588.52; that the defendant discharged plaintiff on June 27, 1933, and the defendant refused to pay the commissions due the plaintiff.

To this statement of claim the defendant filed its affidavit of merits, admitting that it had hired plaintiff as Midwestern Division Manager to perform such duties as defendant might from time to time require, at the salary and commission stated in plaintiff's claim, denies that the hiring of the plaintiff was for one year, and denies that this defendant agreed to pay commissions on "World's Fair" business, or that the plaintiff procured said business, and denies that any sum is due the plaintiff for salary, commissions or otherwise by the defendant.

The evidence in this record was procured and offered by the plaintiff in support of his claim. No evidence was offered by the defendant. There is evidence, in substance, that the plaintiff on November 20th, or 21st, 1932, was told by W. L. Tenney, sales manager for the defendant, after the plaintiff was hired to go after the "World's Fair" business, that he would be taken care of as to commissions.

Plaintiff's evidence is to the effect that the "World's Fair" business was obtained by him for defendant, and that the business so obtained aggregated the sum of \$30,000, for which he did not receive payment of commissions.

It appears from the facts that in order to establish the amount of business transacted for each of the months while the plaintiff was employed by the defendant, plaintiff served a notice upon the defendant, four days before the trial, to produce at the hearing "books of accounts or records showing the orders received from the Century of Progress, Incorporated, by the defendant, and any and all other papers or books relating to the employment of the plaintiff by

the defendant," and that upon failure to produce, the plaintiff would offer secondary evidence thereof. The defendant did not produce the books and records, and the plaintiff in order to meet this situation offered evidence that the plaintiff in the presence of Tenney, the sales manager of the defendant, made a memorandum from the defendant's daily ledger. In this book the monthly reports of all business done in this territory were made, and in Tenney's presence the plaintiff called off the figures, and Tenney and the plaintiff compared them with the previous year's business. Tenney made no objection to any of the records or the figures as they were compared.

The trial court ruled that the notice was not sufficient, and sustained defendant's objection to plaintiff's testifying by reference to the memorandum made from the books as to the monthly business done by the defendant, during the time services were rendered by the plaintiff as Division Manager. There is evidence that orders were received, and posted in a daily ledger showing the amount and by whom made. The plaintiff offered to prove that if the witness were permitted to refresh his memory from the memorandum he made, he would testify that the business transacted by the defendant company during January, 1933, in the territory assigned to plaintiff, was \$13,093.76; during February, 1933, \$1,303.84; during March, 1933, \$5,548.97; during April, 1933, \$6,096.96, and during May, 1933, \$8,702.82.

The defendant in order to support its position, contends that the notice to produce was not sufficient to require the defendant to produce the books of account in its possession; and that the notice is not in the record. The defendant is in error. The notice in question is incorporated in the bill of exceptions, and the material part of the notice is set forth in defendant's brief, from which it appears that the notice is sufficient foundation for the introduction of secondary evidence, not alone as to the business transacted with the defendant, but also from the books and papers as to other

the defendant, and that upon a review of the records, the plaintiff would
other records, and the defendant. The defendant has not produced the
books and records, and the plaintiff in order to meet this objection
offered evidence that the plaintiff in the person of James, the
sales manager of the defendant, made a memorandum from the defendant's
daily ledger. In this book the monthly receipts of all business done
in this territory were made, and in January, 1937, the plaintiff
called off the figures, and James, the defendant's sales manager, then
with the previous year's business, James made an objection to any
of the records or the figures as they were submitted.
The trial court ruled that the objection was not sufficient,
and sustained the plaintiff's objection to the defendant's testimony by
reference to the memorandum made from the books as to the monthly
business done by the defendant, stating that the records were retained
by the plaintiff as Division Manager. There is evidence that papers
were received, and posted in a daily ledger covering the period and by
whom made. The plaintiff offers to prove that in the witness were
permitted to refresh his memory from the memorandum as a 12, he could
testify that the business transacted by the defendant company during
January, 1937, in the territory assigned to plaintiff, was \$12,032.63;
during February, 1937, \$1,704.62; during March, 1937, \$3,062.33;
during April, 1937, \$6,016.37, and during May, 1937, \$5,702.63.
The defendant in order to rebut the plaintiff's testimony, contended
that the notice to produce was not sufficient to require the defendant
to produce the books of account in its possession; and that the notice
is not in the record. The defendant is in error. The notice is
question is interpreted in the light of the objection, and the material
part of the notice is not shown in defendant's error, and which is
appears that the notice is sufficient foundation for the introduction
of secondary evidence, and also as to the balance transmitted.

business transacted by the plaintiff during his employment by the defendant.

The plaintiff, as we have already indicated, offered to prove by reference to the memorandum, in order to refresh his memory, the amount of business transacted in his division for each of the months involved in this litigation. In our opinion, the court erred in refusing to permit the plaintiff to refresh his recollection from the memorandum made and compared in the presence of Tenney, the defendant's Sales Manager.

The procedure followed by the plaintiff was a means which justified the introduction of secondary evidence. Upon refusal to produce books and papers called for by notice, the method followed by the plaintiff in this case has been approved by many decisions of the courts exercising appellate jurisdiction. The admissibility of this evidence was competent, and the Supreme Court in the case of Scovill Manf. Co. v. Cassidy, 275 Ill. 462, so held upon a question somewhat in point, and said:

"Counsel for plaintiffs in error also object to certain testimony of Adams given after he had refreshed his recollection from an order book kept in the defendant in error's office in Chicago. The book itself was not introduced or offered. Some of the entries were made by Adams himself and other entries apparently under his direction. The material point of the evidence was whether certain goods, the payment of which had been guaranteed by the plaintiffs in error, had been delivered to the Canchester Company. A witness can testify only to such facts as are within his knowledge and recollection, but he is permitted to refresh and assist his memory by the use of a written instrument, memorandum or entry in a book, and it is not necessary that the writing should have been made by the witness himself or that it should have been an original writing, provided that after inspecting the record he can speak to the facts from his own recollection. Neither is it necessary that the writing thus used should itself be admissible in evidence. (1 Greenleaf on Evidence, - 15th ed. - sec. 436; Jones on Evidence, - 2d ed. - secs. 877, 878; 5 Chamberlayne's Modern Law of Evidence, sec. 3507; 40 Cyc. 2452; Miner v. Phillips, 42 Ill. 123.)"

...of the
... ..

The

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

... ..

It would seem from this opinion of the Supreme Court that the plaintiff should have been permitted to refresh his recollection from the memorandum made by him from the books, and the court erred in sustaining the objection made by the defendant, which prevented the plaintiff from stating from his memory so refreshed, the amount of business done during the months that he was employed by the defendant.

For the reasons indicated in this opinion, the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

WILSON AND HALL, JJ. CONCUR.

It would seem from this opinion of the Justice that the plaintiff would have been entitled to recover the consideration from the defendant were it not for the fact, and the court says in sustaining the objection that the plaintiff had not shown the amount of the consideration from all parties to the contract, the amount of benefit done during the period that he was engaged in the defendant.

For the reasons assigned in this opinion, the defendant will be reversed and the case remanded for further trial.

REVEREND JUDGE

WILSON AND PAUL, JR. COUNSEL

37315

CHESTER J. ZELLERS,
(Complainant) Defendant in Error,
v.

ALICE ZELLERS,
(Defendant) Plaintiff in Error.

WRIT OF ERROR TO
SUPERIOR COURT

COOK COUNTY.

277 I.A. 614³

Opinion filed Oct. 23, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court by the defendant upon a writ of error directed to the Superior Court to review the record in the case of Chester J. Zellers, complainant, and Alice Zellers, defendant, wherein the court on August 17, 1933, denied the prayer of the petition filed by the defendant on August 11, 1933, to vacate the decree for divorce, entered by the trial court on April 26, 1933.

The facts stated in the petition are, in substance, that a hearing in said cause was had, after a motion was made for a continuance, on the ground that the petitioner was ill in St. Paul, Minnesota, and that petitioner as defendant was unable at the time to attend the contested hearing of the cause; that the bill for divorce was filed on the 18th day of October, A. D. 1932, and petitioner entered her appearance and filed an answer to said bill, and that a stipulation was entered into between the parties to the above entitled cause to the effect that a hearing would be had upon the bill and answer as a default matter, and that the complainant would pay petitioner, the defendant, the sum of \$8.00 a week as and for alimony; that upon the hearing on the 25th day of April, A. D. 1933, the complainant and witnesses testified that the complainant and the defendant had not lived together as husband and wife since the 4th day of October, A. D. 1931.

The petitioner further stated that the complainant repeatedly requested petitioner to go away and leave him, and that if she did not leave the complainant he would resign his position and leave

27214

CHESTER A. MILLER

(Complainant) (Petitioner)

ELLY MILLER

(Respondent) (Defendant)

ST. 11. 614

Opinion filed Oct. 23, 1934

RE, PETITION FOR DIVORCE, and for the purpose of the same.

This cause is to this Court by the filing of a bill

of error directed to the Superior Court in which the same is

the date of Chester A. Miller's, Complainant, and Elly Miller,

Defendant, wherein the Court on March 11, 1934, denied the bill

of the petition filed by the Complainant on March 11, 1934, in which

the decree for divorce, entered by the said Court on March 11, 1934,

The facts stated in the petition are, in substance, that

a hearing in said cause was held, after a notice was given for a hearing

thereon, on the ground that the Complainant was ill in 1931, 1932, 1933,

and that petitioner as defendant was ordered to pay costs of the same

contested hearing of the cause; that the bill for divorce was filed

on the 18th day of October, A. D. 1934, and defendant testified that

appearance and filed an answer in said bill, and that a verification

was entered into between the parties at the same hearing.

to the effect that a hearing would be had on the bill and answer

on a certain matter, and that the Complainant would be permitted

the defendant, the son of 1870's Court in the said cause; that

the hearing on the bill was held on the 11th day of October, 1934,

and witnesses testified that the Complainant was ill in 1931, 1932,

not lived together as husband and wife since the 11th day of October,

A. D. 1934.

The petitioner further states that the Complainant requested

ly requested judgment on the bill and answer, and that if the

did not leave the Complainant in such a position as to have

her; and that the complainant with the aid of his aunt Katherine Smith, fraudulently persuaded petitioner to go away and visit the sister of petitioner, and that on the 4th day of October, 1931, the complainant purchased a ticket for petitioner to Kansas City, Missouri; that he escorted petitioner to the train, and that she did not desert the complainant.

The petitioner also stated that upon her return to Chicago she met the complainant, and after the 4th day of October, 1931, he took her to his home at the Miramar Hotel, and remained over night and cohabited with the petitioner; that after the complainant moved to the Stonehenge Hotel, at 6319 Kenwood Avenue, Chicago, he brought the petitioner to his apartment; that they lived there and cohabited as husband and wife until on or about the 15th of August, 1932.

It further appears from the petition that in the month of April, 1932, the complainant asked petitioner to go to St. Paul, Minnesota, for the purpose of seeing his mother and to convince complainant's mother that it would be best for the complainant to live with his wife; that while the petitioner was in St. Paul, she received a letter from the complainant dated the 26th day of April, 1932, in which he said:

"sorry to say that I have changed my mind. I am going to room with one of the boys as yet. I think it would be advisable for you to stay in the city there for a little while."

The petitioner states in her petition that the true facts were not before the court at the time the decree was signed; that she received a letter dated the 20th day of April, 1933, from her former solicitor, Max Borchardt, in part as follows:

"I have nothing further to say in the matter except to urge you to be here for the hearing, except that I may tell you that the attorney representing Mr. Zellers and I had quite a chat, and I finally had him to agree to pay you \$10.00 per week instead of \$8.00 during the time that you remain unmarried, provided the decree for divorce is signed by the Court."

her, and that the commission with the aid of the law
with, it is not possible to do so. The
the date of petition, the date of the day of petition, 1911,
the commission received a letter from the petitioner on January 11th,
1911; that on January 11th, 1911, the petitioner had filed
not receive the commission.

The commission had filed with the petition on January
the date of petition, and after the 15th day of January, 1911, he
took her to his home at his home at 11, and remained over night
and remained with the petitioner; that after the commission moved
to the St. Lawrence Hotel, at 1111 St. Lawrence Street, he moved
the petitioner to the apartment; that they lived there and remained
at 1111 St. Lawrence Street on or about the 15th of January, 1911.

It further appears from the petition that in the month of
April, 1911, the commission moved to his home at 11, and
remained, for the purpose of seeing the mother and the petitioner.
Petitioner's father that he would be with the commission in the
with his wife; that while the petitioner was in St. Paul, and received
a letter from the commission dated the 15th of April, 1911, in
which he said:

"Sorry to say that I have received no word from you since
to come with me to the city. I think it would
be advisable for you to come to the city where I
live."

The petitioner states in her petition that the commission
did not before the date of the date she received the letter; that
she received a letter dated the 15th day of April, 1911, from the
commission, in which he said:

"I have nothing further to say in the matter except
to urge you to come to the city, where I
live. I have nothing further to say in the matter except
and I have a great deal to say to you
to pay you \$10,000, and I have a great deal to say to you
that I have a great deal to say to you
divorce is a great deal to say to you."

Then follows the prayer that the decree may be vacated upon the grounds stated.

The ground urged by the defendant is that the court erred in the entry of the order denying the prayer of the petition, for the reason that where a fraud is committed on the Court, a judgment or decree may be set aside at a subsequent term where the facts are subject to correction under Section 89 (now Section 72) of Chapter 110, Cahill's Illinois Rev. Stats. and relate to facts unknown to the court, and which if known, would, as a matter of law preclude the rendition of a judgment.

The first serious question presents itself at the outset as to whether the court had jurisdiction to entertain the petition of the defendant. Section 89 of Chap. 110 of the Practice Act provides, in part, as follows:

"The writ of error coram nobis is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing. *** "

This, however, applies only to law actions, and not to proceedings in chancery. This cause being a chancery proceeding, this section of the Practice Act does not apply. In a chancery proceeding, the proper practice to impeach and set aside a decree after the term is to file an original bill in the nature of a bill of review. In the case of Tosetti Brewing Co. v. Koehler, 200 Ill. 369, the court said upon this question:

"In an action at law the statute abolishing the writ of error coram nobis and substituting therefor a motion, authorizes the court to set aside a judgment at any time within five years, for an error of fact that came within the scope of the writ as it existed at common law, and such errors of fact may involve questions of duress, fraud or excusable mistake without negligence on the part of the party against whom judgment is rendered; but aside from cases within the purview of the statutory motion, a court cannot set aside, reverse or change its judgment after the

term at which it is rendered. The statutory motion does not apply to cases in chancery. A decree regularly entered cannot be altered or amended after the term has elapsed, except for the correction of matters of form or clerical errors, - and even such amendments cannot be made merely upon the evidence of solicitors contradicting what appears of record. These rules have been settled by repeated decisions of this court. (Cook v. Wood, 24 Ill. 295; State Savings Institution v. Nelson, 49 id. 171.) A decree cannot be vacated or amended at a subsequent term on motion or petition for the purpose of correcting an alleged error which involves the merits of the case. (5 Ency. of Pl. & Pr. 1049.) The proper method of impeaching and setting aside a decree after the term is to file an original bill in the nature of a bill of review, when such decree may be set aside, reversed or modified, according to the equities of the parties. (Adamski v. Wlaczorek, 170 Ill. 373.)"

In the case of Gigler v. Keinath, 167 Ill. App. 65, the court said:

"The motion of appellants to set aside and vacate the decree establishing the lien and the order approving the sale was made long after the term of court at which they were entered had ended, and was an attempt by the motion provided for in section 89 of the Practice Act, as a substitute for the writ of error coram nobis, to have the court that entered the same review its own findings of fact and correct the same if found to be erroneous. That section of the Practice Act does not apply to cases in chancery. Tosetti Brewing Co. v. Koehler, 200 Ill. 369. While courts of chancery have control over their orders and decrees during the term at which the same are entered, they have no such control at a subsequent term and when the cause is no longer pending in the court. Appellant's motion was, therefore, properly denied."

For the reasons stated in this opinion, the order entered by the court on August 17, 1933, was properly entered, and it is therefore affirmed.

ORDER AFFIRMED.

HALL AND WILSON, JJ. CONCUR,

37004

FIRST UNION TRUST AND SAVINGS BANK,
a Corporation, as Trustee,

(Complainant) Appellee,

v.

BERNARD A. STOL, et al.,

(Defendants).

On Appeal of

ARCHITECTURAL DECORATING COMPANY, a
corporation,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

277 I.A. 614⁴

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On the 25th of July, 1931, a bill was filed by the trustee in a trust deed to foreclose the trust deed given to secure a debt of \$100,000. The trust deed was signed by Morris Sugar, Fannie Sugar and Harry Karmes and conveyed the following described property:

"Lots Seventy Four (74), Seventy Five (75), Seventy Six (76) and the South Sixteen (S.16) feet of Lot Seventy Seven (77) in Arthur Avenue Subdivision of Twenty Six (26) acres in the South West Quarter (S. W. $\frac{1}{4}$) of Section Thirty One (31), Township Forty One (41) North, Range Fourteen (14), East of the Third (3rd) Principal Meridian, according to the plat thereof recorded January 4, 1922, as Document 7366967, in Cook County, Illinois."

Summons was issued, returnable to the September 1931 term of the Superior Court of Cook County.

On September 11th, 1931, the Architectural Decorating Company, a corporation, appellant here and a defendant in the foreclosure proceeding, filed an answer in the proceeding in the nature of an intervening petition, in which it is alleged in substance that on September 10th, 1927, Henry Sugar, doing business as Henry Sugar & Company, for the purpose of installing mantels as a permanent addition to the building upon the lot or parcel of land described, entered into a contract with the Architectural Decorating Company for

WYOM

First Bank Trust and Savings Co.,
a corporation, of Wyoming,

(General Agent)

v.

WILLIAM L. BIRD, of Wyo.

(Defendant).

On appeal of

WILLIAM L. BIRD, Plaintiff,
vs.
WILLIAM L. BIRD, Defendant.

(Defendant)

Opinion filed Oct. 23, 1934

MR. JUSTICE WILLIAM L. BIRD, of the Court.

In the year of 1931, 1932, and 1933, the plaintiff

in a suit filed to recover the sum of \$100,000.00.

of \$10,000.00. The first case was filed in 1931, 1932, and 1933.

and the plaintiff and defendant the following facts:

1. The plaintiff (1931, 1932, 1933) was a
(1931) and the defendant (1931, 1932, 1933) was a
(1931) in the year 1931, 1932, 1933, and 1934.
(1931) in the year 1931, 1932, 1933, and 1934.
(1931) in the year 1931, 1932, 1933, and 1934.
(1931) in the year 1931, 1932, 1933, and 1934.
(1931) in the year 1931, 1932, 1933, and 1934.
(1931) in the year 1931, 1932, 1933, and 1934.

WILLIAM L. BIRD, Plaintiff, vs. WILLIAM L. BIRD, Defendant.

Opinion filed Oct. 23, 1934.

On September 11, 1931, the defendant

WILLIAM L. BIRD, Plaintiff, vs. WILLIAM L. BIRD, Defendant.

Opinion filed Oct. 23, 1934.

On September 11, 1931, the defendant

WILLIAM L. BIRD, Plaintiff, vs. WILLIAM L. BIRD, Defendant.

Opinion filed Oct. 23, 1934.

On September 11, 1931, the defendant

WILLIAM L. BIRD, Plaintiff, vs. WILLIAM L. BIRD, Defendant.

the performance of such work; that the property described is known as 6442-56 Claremont avenue, Chicago, Illinois; that the Architectural Decorating Company entered into the agreement mentioned with Henry Sugar & Company, whereby the Architectural Decorating Company agreed to furnish all labor and materials necessary for such improvement, and that Henry Sugar & Company agreed to pay the Architectural Decorating Company the sum of \$3,132.00 for the work so agreed to be done. It is further alleged that thereafter the Architectural Decorating Company delivered all the materials and completed all the work required to be done by such agreement upon the premises, and otherwise fully performed the agreement in accordance with its terms; that the Architectural Decorating Company furnished and delivered extra or additional materials upon the premises for use in and as a part of a permanent improvement, at the special instance and request of Henry Sugar, doing business as Henry Sugar & Company; that the extra labor and materials were of a value of \$292.55, and that the last mentioned materials were delivered and the work completed prior to and on September 29th, 1927. It is also alleged that the property described was enhanced in value by reason of the labor and materials furnished, and that nothing has been paid on account thereof; that Max E. Stein was the holder of the fee title to the property described, and that Henry Sugar, doing business as Henry Sugar & Company, was authorized by Stein to contract for the improvement; also that on December 9th, 1927, the Architectural Decorating Company filed with the Clerk of the Circuit Court of Cook County a claim for mechanic's lien against the property described, verified by the agent of the petitioner, consisting of a brief statement of the contract, the balance due after allowing all credits, and a sufficiently correct description of the tract of land to identify

[illegible]

the same as the lot or tract of land described in the bill of complaint in this case; that on March 2nd, ¹⁹²⁸ the Architectural Decorating Company filed its answer in the nature of an intervening petition in the case entitled Morris Billeck vs. Henry Sugar, et al., in the Circuit Court of Cook County General No. B-158269; that this cause is still pending, and that the intervening petition filed therein is based on the same claim for mechanic's lien as is the claim in the intervening petition filed in the instant case. It is not disputed by the complainant in this suit, appellee herein, that the property involved in that case is the same as that involved in the instant case.

The prayer of this intervening petition is that it be decreed by the court that the petitioner is entitled to a lien on the property described for its claim, and that proper proceedings follow to enforce such lien. The court ordered that the cause be and it was referred to a master in chancery to take proofs and report his conclusions and evidence.

On November 4th, 1932, the master to whom the cause was referred filed his report with the clerk of the Superior Court, finding among other things, that on July 2nd, 1927, Morris Sugar and Fannie Sugar, his wife, and Harry Karmes, a bachelor, held title to the real estate described, and that they conveyed the same to Max E. Stein by warranty deed bearing date of July 2nd, 1927, and recorded in the Recorder's Office of Cook County on October 11th, 1927; that on December 1st, 1927, Max E. Stein, a bachelor, made and executed his warranty deed bearing date of December 1st, 1927, conveying the real estate described to Morris Sugar, and that said deed was recorded; that subsequently Morris Sugar conveyed the premises to Adeline Lamick by quit claim deed bearing date of September 21st, 1928, filed in the Recorder's Office of Cook County; that no money

the case on the lot or piece of land described in the bill of
complaint in this case; but on March 19, 1932, the defendant
sincerely filed its answer in the nature of an intervention petition in
the case entitled *Wills v. Henry*, No. 11, in the
District Court of Jackson County, Missouri, No. 11-1932; that said case
is still pending, and that the intervention petition filed therein is
based on the same claim for specific relief as is the one in this
intervention petition filed in the instant case. It is not disputed
by the complainant in this suit, appellant herein, that the property
involved in that case is the same as that involved in the instant
case.

The prayer of said intervention petition is that it be
decided by the court that the petition is entitled to a lien on the
property described for its claim, and that proper proceedings follow
to enforce such lien. The court ordered that the case be and it
was referred to a master in chancery to take facts and report his
conclusions and evidence.

In November 4th, 1932, the master in chancery made
reference filed his report with the clerk of the District Court, finding
among other things, that on July 1st, 1927, Henry Wills and family
Wills, his wife, and Harry Wills, a brother, sold title to the
real estate described, and that said conveyed the same to Mrs. J.
Wills by certain deed bearing date of July 1st, 1927, and recorded
in the Recorder's Office of Jackson County at Record Book 1137; that
on December 1st, 1927, Mrs. J. Wills, a brother, wife and recorded
his property deed bearing date of December 1st, 1927, conveying the
real estate described to Maria Wills, and that said deed was
recorded; that subsequently Maria Wills then conveyed the premises in
question to said claimant bearing date of September 1st,

or other consideration passed at the time of execution of the warranty deed to Stein, or at the time of the execution and delivery of the warranty deed by Max E. Stein to Morris Sugar; that on June 3rd, 1927, Henry Sugar, son of Morris Sugar, entered into a written contract with the Architectural Decorating Company, intervening petitioner, whereby the said intervening petitioner agreed to furnish certain mantels in the building then being erected on the described premises for the sum of \$3,132.00; that on September 10th, 1927, the intervening petitioner received an additional order in writing from Henry Sugar for setting 36 mantels in the building, for which he agreed to pay at the rate of \$2.50 per hour for master mechanic and \$1.40 per hour for helper; that the intervening petitioner furnished the mantels as required under the contract of June 3rd, 1927, and furnished the labor for setting the mantels, in accordance with the order of September 10th, 1927, which labor amounted to \$292.55; that the last work was done under the contract and on the extra order on September 29th, 1927; that no part of the sum of \$3,132.00, due under the original contract, or of the sum of \$292.55, due under the contract of September 10th, 1927, has ever been paid; that on December 9th, 1927, the intervening petitioner caused to be filed with the clerk of the Circuit Court of Cook County a notice of claim for mechanic's lien, in which notice it was stated that the date of the original contract was : "To-wit: September 10th, 1927," and that at the time said contract was made, Max E. Stein was the owner of the property; that the intervening petitioner claims a mechanic's lien on the real estate described in the total sum of \$3,424.55, together with interest thereon from September 29th, 1927. The Master found that on behalf of complainant herein it is contended that the intervening petitioner is not entitled to a mechanic's lien,

on other considerations, amount of the time of preparation of the
necessarily lead to delay, or to the risk of the material not being
of the contract made by the U. S. Navy in 1937; that in
June and July, 1937, the Navy ordered the construction of a
a written contract with the International Telephone Company, 1937-
vening particularly, whereby the International Telephone Company
to furnish certain models in the building and other material on the
described premises for the use of the U. S. Navy in 1937; that in
1937, the International Telephone Company furnished a contract order in
existing from Navy order for setting up models in the building, for
which he is paid at the rate of \$1.50 per hour for design
mechanic and \$1.50 per hour for setting up; that the International Telephone
Company furnished the models as required under the contract of June 1937;
1937, and furnished the first set of models for the Navy, in accordance
with the order of September 1937, 1937, which order was issued by
1937.55; that the first set of models was made under the contract and the
extra order on September 1937, 1937; that the first set of models was
\$5,124.00, the balance of the contract was \$1,000.00, or a total of \$6,124.00;
the under the contract of September 1937, 1937, the first set of models;
that on November 1937, 1937, the International Telephone Company
we list first the work of the International Telephone Company in 1937;
of claim for the Navy's use, in which order it was stated that the
date of the original contract was 1937-11-11; November 1937, 1937;
and that at the time said contract was made, the U. S. Navy was the
owner of the premises; that the International Telephone Company
a mechanic's lien on the first set of models as the work was done
1937.55, together with interest thereon from September 1937, 1937.
The matter being that the models of the International Telephone Company is
that the International Telephone Company is not entitled to a mechanic's lien.

because at the time of the making of the contract, Stein was the owner of record of the premises, and that Henry Sugar was not authorized by Stein, the then owner of the real estate, to contract for the improvements mentioned in the contract; that Stein owned the premises when the contract of September 10th, 1927, was made; that Morris Sugar and Harry Karmes owned the premises on June 2nd, 1927, and that there is no allegation in the answer or the intervening petition that Morris Sugar or Harry Karmes permitted the improvements, and there is no proof that Stein authorized or permitted, or ever knew of such improvements. In respect to this contention, the Master found that during the period commencing June 2nd, 1927, and ending September 1st, 1928, the property in ^uquestion was owned by Morris Sugar; that Harry Karmes had no interest in the property, and that Stein, during the period the title was vested in him, held the title for the use and benefit of Morris Sugar; that Morris Sugar authorized and permitted Henry Sugar to enter into the contract with the intervening petitioner, and knew that such improvements were being installed, and consented to the same; that the answer and intervening petition of the Architectural Decorating Company was filed on September 11th, 1931; that on March 2nd, 1928, the intervening petitioner herein filed an intervening petition in the cause entitled Morris Billeck vs. Henry Sugar, et al., defendants, in the Circuit Court of Cook County, General No. B-158269, alleging in substance the same facts contained in the petition filed in this proceeding; that in the bill of complaint filed in that cause in Circuit Court, and then pending, complainant described the real estate involved in the said proceeding as follows:

"Lot 74-76 and the South 16 feet of Lott 77 in Archer Avenue Subdivision of 26 acres commencing 6 chains north of south west corner of section 31, Township 41 North, Range 14, East of the 3rd Principal Meridian, thence running North

6.50 chains; thence east parallel with section line 40 chains; thence south 6.50 chains; thence west 40 chains, to place of beginning in Cook County, Illinois.

Lot 77, except South 16 feet thereof in Archer Avenue Subdivision of 26 acres commencing 6 chains North of South West corner of Section 31, Township 41 North, Range 14, East of the 3rd Principal Meridian, thence running North 6.50 chains; thence East parallel with section line 40 chains; thence south 6.50 chains; thence west 40 chains to place of beginning in Cook County, Illinois;" and

that in the affidavit as to unknown owners attached to the bill of complaint in that cause, the real estate involved was described in the same way as in the bill of complaint. The Master further found that it was contended by the complainant herein that the property so described in the suit in the Circuit Court is not the same property as that described in the bill filed herein. The Master also found that it was contended by complainant that the description of the lots, "Lots 74-76 and the south 16 feet of Lot 77," even if the other portions of the description could be found to be sufficient, failed to indicate upon which of the lots the placing of the mantels, for which the lien is claimed, were placed. In answer to this contention of complainant, the Master found that the description of the premises in the Circuit Court cause was sufficient to identify the premises described as the premises in question, and that such description was, therefore, sufficient. The Master also referred to the fact that it is contended on behalf of complainant that the claim for lien and the allegation in the intervening petition state that the contract was dated September 10th, 1927, whereas, as a matter of fact, the contract was made on June 2nd, 1927, and the contract for extras was made on September 10th, 1927. As to this contention, the Master found that the variance was not such as to defeat the petitioner's rights in the premises, and concluded that the intervening petitioner had a valid and subsisting mechanic's lien upon the real estate described for the sum of \$3,424.55, together with interest thereon at

[illegible][illegible]

the rate of 5% per annum from September 29th, 1927; that the lien of complainant in the foreclosure suit is subject to the lien of the Architectural Decorating Company, intervening petitioner.

The case was heard by the chancellor on exceptions filed to the master's report. The exceptions were sustained, and in the decree of foreclosure the court dismissed the intervening petition for want of equity, thus denying petitioner's claim of lien. After the Master's report had been filed in the Superior Court, and after the court had held, as stated by counsel, that a material variance existed between the pleadings and proofs, and before the decree had been entered, petitioner moved that leave be given it to file an amended answer in the nature of an intervening petition so that the pleadings and proofs would conform, which motion was denied by the court.

There is no question raised here, but that the materials were furnished and the work done as alleged, which have resulted in a permanent and valuable improvement to the property in question, and that the claimant would have had its lien on the property, had it properly preserved its rights.

Cahill's Illinois Revised Statutes, 1933, Chapter 82, paragraph 7, provides:

"No contractor shall be allowed to enforce such lien against or to the prejudice of any other creditor or encumbrancer or purchaser, unless within four months after completion, *** he shall either bring suit to enforce his lien therefor, or shall file with the clerk of the circuit court in the county in which the building, erection or other improvement to be charged with the lien is situated, a claim for lien, verified by the affidavit of himself, or his agent or employee, which shall consist of a brief statement of the contract, the balance due after allowing all credits, and a sufficiently correct description of the lot, lots or tracts of land to identify the same. Such claim for lien may be filed at any time after the contract is made, and as to the owner may be filed at any time after the contract is made and within two years after the completion of said contract, or the completion of any extra work, or the furnishing of any extra material thereunder, and as to such owner may be amended at any time before the final decree. No such lien shall be defeated to the proper amount thereof because of an error or overcharging on the part of any person claiming

a lien therefor under this Act, unless it shall be shown that such error or overcharge is made with intent to defraud;*** provided it is shown that such material was delivered either to the said owner or his agent for such building or improvement to be used in said building or improvement, or at the place where said building or improvement was being constructed, for the purpose of being used in construction, or for the purpose of being employed in the process of construction as a means for assisting in the erection of the building or improvement ***."

It is admitted that on June 2nd, 1927, the claimant entered into a contract with Henry Sugar for the doing of the major portion of the work alleged to have been done; that on September 10th, 1927, the claimant received an order for the extra work, for which this claim of lien is made, and on September 29th, 1927, the work was completed; that on December 9th, 1927, the claimant filed in the office of the Clerk of the Circuit Court of Cook County a claim for lien for such work and materials furnished, in which he stated that the work was done under a contract dated, "to-wit: September 10th, 1927" (the date of the supplemental agreement for the extras.)

In Toan vs. Russell, 111 Ill. App. 629, the contract upon which the mechanic's lien was predicated was entered into on June 15th, 1901. The petition there alleged that the contract was made on or about August 1st, 1901. The court there held that the claim of variance was not well taken.

In Stepina vs. Conklin Lumber Co., et al., 134 Ill. App. 173, the claim of variance was that in the statement of claim the contract was alleged to be an entire one, while the contract proved was one to furnish materials as defendant might order, and the court said: "The mechanic's lien could hardly be said to be 'liberally construed as a remedial act,' as in itself it is provided that it shall be, if a fatal variance could be detected here." Also that "The gist of the argument *** is that the contract is alleged in the statement *** to be a written one, while the contract proved is an oral one. *** If

a mistake was made, it injured no one. To defeat a lien on such an objection would certainly not be to construe the act 'liberally as a remedial act.'"

We are of the opinion that in the instant case the statute was complied with, and that the claim of variance between the allegation and the petition, and the proof as to the date of the contract, is not well taken, and that the master was justified in so finding. As to the question of a variance between the pleading and the proof as to the description of the premises involved, we call attention to the statute, wherein it is provided that the claim for lien shall contain "a sufficiently correct description of the lot, lots or tract of land to identify the same." We are of the opinion that the description given was sufficient. Further, the proof shows that the materials were furnished and the work done for the improvement of the property described in the bill of complaint filed herein. Any interested person, upon reading these two descriptions, could easily identify the property intended to be described.

The complainant insists that "the contracts were made with one Henry Sugar." The answer here and in the Billeck case allege that Henry Sugar was authorized and permitted by Max E. Stein, the then owner, to contract for the improvement. Max E. Stein did not own the premises when the contract of June 2nd, 1927, was made. He did own it when the contract of September 10th, 1927 was made. Morris Sugar and Harry Karmes owned the property on June 2nd, 1927. On December 1st, 1927, Stein reconveyed the property to Morris Sugar, who held the title until September, 1928. The evidence tends to negative the idea that any consideration passed at the time of any of these conveyances. It is further shown that Morris Sugar authorized Henry Sugar to make the contracts in question.

In Springer vs. Kroeschell, 161 Ill. 358, the Supreme Court said:

11. *For the following, a*

"As to some of the appellees, their pleadings aver, and their proofs show, that they made their contracts with Hibbert J. Lehman as owner. The first section of the Mechanic's Lien law, as it existed when these contracts were made, gives the lien to any person, 'who shall, by contract, express or implied, or partly expressed and partly implied, with the owner of any lot or piece of land, furnish labor or material.' (2 Starr & Cur. Stat. p. 1512). It would appear from the evidence and from the finding of the decree, that those of the appellees, who thus contracted directly with the holder of the legal title as owner, had no notice that the title was so held in trust for other persons. In thus contracting with the holder of the legal title without notice of the interests of the cestui que trust, was the statutory requirement, that the contract should be with the 'owner', complied with? It must be remembered, that the party here holding the legal title was superintending the construction of the building. Hibbert J. Lehman was not only permitted by the real owners to hold the title, but to supervise the erection of the building upon these premises, and to deal with parties furnishing work and materials therefor. Where the owner of property allows another to appear as the owner thereof, and innocent persons are thus led into dealing with such apparent owner, they will be protected. *** Where the equitable owner of land, who has paid an agreed price therefor, permits a building to be erected thereon, and suffers the legal title to remain in another until its completion, the holder of the legal title is, for all practical purposes pertaining to the construction of the building, the owner within the meaning of the Mechanic's Lien law, and the equitable estate will be equally bound with the legal title to satisfy the liens of mechanics, or material men, growing out of contracts made with him in the construction of the building. (Hinckley v. Field's Biscuit, etc. Co. 91 Cal. 136). 'Where a party holds the legal title, and makes improvements, the land is bound for the liens of the mechanics; and this party is the owner, though the funds, with which the property was purchased, belonged to other persons.' (Phillips on Mechanics' Liens, sec. 66; Anderson v. Dillaye, 47 N. Y. 678)." (Italics ours)

Before the entry of the decree, claimant asked leave to amend its answer and petition so as to make them conform to the proofs, and thus avoid any claim of variance.

Smith-Hurd Illinois Revised Statutes 1931, chapter 22, section 37, provides that, "the court *** may permit the parties to amend their bills, pleas, answers and replications on such terms as the court may deem proper, so that neither party be surprised nor unreasonably delayed thereby." Under the circumstances, in this

case, and to avoid any question, we are of the opinion that the court should have exercised its discretion in allowing claimant to amend its pleadings. It would have worked no hardship upon complainant, or upon any one else.

In Gregg v. Brower, 67 Ill. 525, the Supreme Court said:

"The practice in this state, we think, has not been so rigid as in the English or New York chancery, in respect to amendments. They are regarded as peculiarly within the discretion of the court, and it has usually been liberally exercised in the furtherance of justice, after replication filed, and even on the hearing. Jefferson Co. v. Ferguson, 13 Ill. 33; Martin v. Eversal, 36 ib. 222; Mason v. Blair, ib. 195; Farwell v. Meyer, et al., 35 ib. 40; Marble Bonhotel, ib. 240; Moshier v. Knox College, 32 ib. 155."

We are of the opinion that claimant is entitled to a lien, and that the court erred in sustaining the exceptions to the master's report and in dismissing the answer in the nature of an intervening petition filed by claimant. The cause is, therefore, reversed and remanded with the direction that the court enter an order in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

$$\frac{1}{n} \sum_{i=1}^n \log p_i = -\frac{1}{n} \sum_{i=1}^n \log p_i$$

to be of the same kind as the one in the first case.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

[illegible]

37016

D. B. BENTLEY,

Appellee,

v.

L. J. LIPPERT,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

277 I.A. 615¹

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County entered in a proceeding brought by plaintiff against defendant to recover for injuries alleged to have been sustained by plaintiff, caused, as alleged, by plaintiff being struck by defendant's automobile.

It is alleged that defendant Lippert owned an automobile which had been parked on a grass plot in front of a building occupied by Hinckley & Schmitt, in the city of Chicago, and that while the agent or servant of defendant was driving the automobile from the grass plot where the car was parked, preparatory to driving it within certain stalls maintained by Hinckley & Schmitt, and while backing the automobile for that purpose, it struck and injured plaintiff. There were five counts in the declaration, and insofar as the questions arising in this appeal are concerned, they are identical.

It is claimed by defendant and not denied that at the time of the accident, plaintiff, defendant, and a man named Compton, who was driving defendant's car at the moment of the accident, were all employees of Hinckley & Schmitt, and that they were under and subject to the Workmen's Compensation Act of Illinois, and that the accident occurred at the place of business of Hinckley & Schmitt on Ontario street in the city of Chicago. The record indicates that on the morning of the accident defendant drove his car and parked it in a grass plot on the grounds of and near the driveway leading to the

1934

U. S. District Court

Eastern District of New York

In re: ...

...

1934

Opinion filed Oct. 23, 1934

1. The first question presented for consideration is whether the defendant is entitled to a judgment of acquittal on the ground that the evidence is insufficient to sustain the verdict.

This is an issue of law, and the court is bound to decide it as a matter of law. The question is whether the evidence is sufficient to sustain the verdict.

Good cause is shown by the evidence to believe that the defendant is guilty of the crime charged. The evidence is sufficient to sustain the verdict.

by plaintiff, and the defendant is entitled to a judgment of acquittal.

defendant's interests.

It is also to be noted that the defendant is entitled to a judgment of acquittal on the ground that the evidence is insufficient to sustain the verdict.

which was taken on the day of the trial, and the evidence is sufficient to sustain the verdict.

pled by the defendant, and the evidence is sufficient to sustain the verdict.

the court on the ground that the evidence is insufficient to sustain the verdict.

the case that the defendant is entitled to a judgment of acquittal on the ground that the evidence is insufficient to sustain the verdict.

again certain facts which are sufficient to sustain the verdict.

holding the defendant is entitled to a judgment of acquittal on the ground that the evidence is insufficient to sustain the verdict.

alike. There are also facts in the case which are sufficient to sustain the verdict.

as the question arises in the case of the defendant, and the evidence is sufficient to sustain the verdict.

of.

It is claimed by the defendant that the evidence is insufficient to sustain the verdict.

of the defendant, and the evidence is sufficient to sustain the verdict.

the defendant is entitled to a judgment of acquittal on the ground that the evidence is insufficient to sustain the verdict.

employees of the defendant, and the evidence is sufficient to sustain the verdict.

to the defendant's interests, and the evidence is sufficient to sustain the verdict.

connected at the time of the trial, and the evidence is sufficient to sustain the verdict.

street in the city of New York, and the evidence is sufficient to sustain the verdict.

meaning of the defendant's interests, and the evidence is sufficient to sustain the verdict.

mean that the defendant is entitled to a judgment of acquittal on the ground that the evidence is insufficient to sustain the verdict.

place of business of Hinckley & Schmitt; that Compton, who was driving defendant's car, which, it is alleged, injured plaintiff, was in charge of the garage and trucks of Hinokley & Schmitt; that at the time of the accident, Compton was in the act of moving this car from where it was parked by defendant into a certain stall, being one of a number of stalls which were maintained for the purpose of parking cars of officials and employees of Hinokley & Schmitt, and that plaintiff was proceeding from the place of business of Hinokley & Schmitt in and about his work for this firm at the time he was injured. The record also indicates that it was the custom of Compton to "put these cars away", referring to the placing of cars in these stalls.

It is insisted by defendant that inasmuch as plaintiff's rights as an employee of Hinckley & Schmitt are fixed and determined by the Workmen's Compensation Act, that therefore, he has no right of recovery here, and that if there is any action to be maintained by any one, it is by Hinckley & Schmitt, subrogated to any rights which plaintiff might have under this Act, and that the act of Compton in moving defendant's car was in the course and in the scope of his employment by Hinckley & Schmitt, and that the common law right of action against either Compton or defendant was abolished by the Workmen's Compensation Act, citing Sections 6 and 9 of such act and O'Brien v. Chicago City Rys. Co., 305 Ill. 244.

Cahill's Illinois Revised Statutes, 1933, Chapter 48, paragraph 206, being Section 6 of the Employees Liability Act, provides that, "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one other-

place of business at Chicago, Illinois; and the
driving defendant's car, which, it is alleged, injured plaintiff, was
in charge of the driver and driver of plaintiff's car; that at
the time of the accident, defendant was in the car and was driving
car from where it was parked by defendant into a public street, being
one of a number of cars which were parked for the purpose of
parking cars at plaintiff's and defendant's building; and
that plaintiff was proceeding from his place of business at defendant's
building in and about his work for this time at the time he was
injured. The record also indicates that at the time of the accident of
defendant to "put these cars away," referring to the parking of cars
in these streets.

It is alleged by plaintiff that defendant's negligence
rights as an employee of defendant's building and defendant's
by the terms of the Compensation Act, that defendant, by not his right
of recovery, and that it was not his right to be recovered by
any one, it is by defendant's negligence, and that it was not his right
which plaintiff's right was not his right, and that it was not his right
in having defendant's car in the street and in the street at the
employment by defendant's car, and that the company has right to
action against defendant's car, and that defendant's car was not his
defendant's Compensation Act, and that defendant's car was not his
O'Brien v. Chicago & North Western Ry. Co., 100 Ill. 304.

Defendant's Illinois Workers' Compensation Act, Chapter 40,
paragraph 10, before section 6 of the Illinois Workers' Compensation
provides that, "The company has an absolute right to recover damages
for injury or death sustained by any employee while engaged in the
line of his duty as such employee, and that the compensation herein
provided, shall be payable to the employee or his estate or his
provisions of this act, or any law which is in conflict with the
provisions of this act, shall be null and void."

wise entitled to recover damages for such injury."

Paragraph 329 of Chapter 48, of Cahill's Illinois Revised Statutes, 1933, being section 29 of such act, provides that, "Where an injury or death for which compensation is payable by the employer under this act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, such other person having also elected to be bound by this act, then the right of the employee or personal representative to recover against such other person shall be subrogated to his employer and such employer may bring legal proceedings against such other person to recover the damages sustained, in an amount not exceeding the aggregate amount of compensation payable under this act, by reason of the injury or death of such employee."

In Bishop, adm. v. Chicago Railways Co., 215 Ill. App. 153, one Frank Birr, decedent, was crushed between a truck on which he was riding and a street car belonging to and operated by the Chicago Railways Company. From the injuries received, he died, and his personal representative, plaintiff in that case, alleged that the accident was caused by the negligence of the defendant in the operation of the car. On the trial, the jury returned a verdict for \$5,000, on which judgment was entered, and from which judgment an appeal was taken. The statement of the case shows that at the time of the accident, Birr was employed by John P. Lynch, who was operating an express business in Chicago under the names of Lynch Teaming Company and Lynch City Express Company. Birr's work was that of a helper on a motor truck owned by the Lynch Company. The cause was reversed and remanded, and in this opinion, the court said:

"We are of the opinion that plaintiff has no cause of action, for the following reasons: At the time of the accident the Workmen's Compensation Act of 1913 was in force. Birr's Employer, Lynch, Birr, the employee, and the defendant

all came within the operation of this act. Under the declaration and the evidence this is conclusively presumed to be the fact. That defendant comes within the act has been held in Chicago Rys. Co. v. Industrial Board of Illinois, 276 Ill. 112. Upon the trial defendant offered to show that Birr and his employer were both under the act, and that plaintiff, as administrator, had instituted proceedings before the Industrial Commission for compensation on account of the accident and death of Birr; that it was right to do so was admitted; an adjudication was had and an award made, which resulted in a settlement for a lump sum which was paid. *** In Keeran v. Peoria E. & C. Traction Co., 277 Ill. 413, these sections were construed to mean 'that no common-law or statutory right to recover damages for any accidental injury arising out of and in the course of his employment shall be available to any employee, either against his employer or against any third person whose negligence may have occasioned the injury, where such person had also elected to be bound by the act, the employer in such case being subrogated to the right of the employee or his personal representative to recover, and the amount of the recovery being limited to the aggregate amount of compensation payable under the act.' This was followed in Friebel v. Chicago City Ry. Co., 280 Ill. 76, (16 N. C. C. A. 390)."

To the same effect are Cunningham v. Metzger, 258 Ill. App. 150, and Nega v. Chicago Railways Co., 317 Ill. 482.

Inasmuch as plaintiff was entitled to compensation under the Workmen's Compensation Act, this court is of the opinion that there is no right of recovery by him against defendant, and the judgment is, therefore, reversed.

REVERSED.

HEBEL, P.J. AND WILSON, J. CONCUR.

37019

STATE BANK OF WEST PULLMAN,
corporation,

Defendant in Error,

v.

JOHN J. PIECH,

Plaintiff in Error.

WRIT OF ERROR

MUNICIPAL COURT

OF CHICAGO.

277 L.A. 615²

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error, the reversal is sought of a judgment of the Municipal Court against defendant for \$906.42. It was entered upon a judgment note and was originally for \$955.82. After its entry, upon petition of defendant, it was opened up and defendant was permitted to present his defense. The cause was submitted to a jury, which returned a verdict of \$906.42, and thereupon the judgment was confirmed for that amount.

In his petition to vacate the judgment, defendant alleges in substance that on or about March, 1930, he desired to purchase from plaintiff a \$2,000 first mortgage on certain property, and for that purpose, negotiated with the president of the plaintiff bank, of which defendant had been a customer for 25 years; that Reichwein, president of the bank, stated to defendant petitioner that the bank did not at that time have a \$2,000 mortgage on property in the vicinity of West Pullman, but that they would have such a mortgage in the near future; that the bank had certain gold mortgage bonds, which, as represented, were good security; that defendant stated to the president of the bank that he did not desire to invest in such gold bonds, and that Reichwein told him that he, defendant, could hold the \$2,000 in gold bonds as security until such time as the bank had a satisfactory \$2,000 first mortgage, and that the bank would at any time take the bonds back and pay the amount represented by them,

UNITED STATES
DEPARTMENT OF JUSTICE

1911, 10, 10

PORTER, PAUL L. 1864-1931

CIC. A. I. 772

[illegible][illegible]

together with accrued interest, should petitioner desire the return of his money; that he called many times thereafter, requesting that the bonds be converted as agreed, but the bank at no time had a first mortgage of \$2,000, as promised; that in November, 1930, defendant requested Reichwein to take back one of the \$500 bonds and pay defendant \$500 with accrued interest; that on June 13th, 1931, he requested Reichwein to redeem one \$500 gold bond, and that Reichwein told him that if he, defendant, was in need of money, the bank would lend him the amount of \$400 and take one of such bonds as collateral, and relying upon Reichwein's promise to adjust the matter, defendant executed a note for \$400, leaving one of the bonds as collateral; that thereafter on December 23rd, 1931, defendant required additional money and that he executed a note for \$850, leaving certain of such gold bonds as collateral and received the money from the bank; that thereafter on June 24th, 1932, relying upon the promise that the bank would redeem the gold bonds which defendant had purchased, he executed a judgment note of that date for the sum of \$955.82, of which sum \$85.00 was for attorney's fees, and that the money received on this last mentioned note was money returned to the defendant in accordance with the original agreement made with the bank with reference to the deposit of \$2,000, and was made on the express promise by Reichwein, president of the bank, that the matter would be adjusted when conditions improved, and that the bank would take back the bonds and pay the note. Defendant offered to prove the alleged facts set forth in his petition, but the court rejected all of such testimony.

There is no suggestion made, but that defendant gave the note to the bank for a consideration. The only defense set forth is that the president of the bank agreed to make another and different deal with the defendant, which it is alleged, he did not carry out.

together with several instances, showing that the person
of his family; that he called him James Harrison, Harrison being
the name he was given at birth, and that he was born at the time and
first mention of \$1,000, in 1890; that in 1890, 1891,
defendant purchased a house in the town of New York, and
for defendant \$100,000, and several others; that in 1891, 1892,
he requested defendant to return and stay with him, and that
defendant told him that he was not going to do so, and that
he would find his own way out of the town of New York, and
collected, and selling some of his property, and selling the house,
defendant created a debt for \$1,000, in the town of New York, and
collected; that defendant in 1891, 1892, 1893, 1894, 1895, 1896,
additional money and that he received a debt for \$1,000, in 1897, in 1898,
of such bonds as collected and received for money from the
bank; that in 1897, in 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905,
that the bank would return the gold bonds which defendant had
cheated, he executed a judgment for \$1,000, and for the sum of
\$100,000, of which sum \$100,000 was the defendant's share, and that the
money received on this last judgment was a sum of money for the
defendant in 1898, and that the defendant received the sum of \$1,000,
and that the defendant in 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905,
expressly ordering it to be done, and that the bank would
would be required to return the money, and that the bank would
take back the bonds and pay the sum of \$1,000, and that the bank
the alleged facts and facts in his petition, and that the defendant
all of such testimony.

There is no testimony that the defendant gave the
note to the bank for a loan. The bank received the note
is that the president of the bank agreed to return the money and
deal with the defendant, and that it is alleged, on all of such testimony.

In Hinsdale State Bank v. Lytle, 262 Ill. App. 151, the court said:

"The note in suit not being without consideration, parol evidence was not admissible to vary its terms. Hesch v. Dennis, 194 Ill. App. 663; Clinton v. Royal, 203 Ill. App. 248; Bradley v. Progressive Metal & Refining Co., 205 Ill. App. 552; First National Bank of Beecher v. Wolf, 208 Ill. App. 283; Weinstein v. Sprintz, 234 Ill. App. 492; Handley v. Drum, 237 Ill. App. 587; Tegtmeyer v. Nordlund, 259 Ill. App. 247; Miller v. Wells, 46 Ill. 46; Mason v. Burton, 54 Ill. 349; In the cases cited it is held that, in an action to recover on a promissory note absolute on its face, evidence of an oral contemporaneous contract in contradiction of the note is inadmissible. In the late case of Tegtmeyer v. Nordlund, supra, we said, p. 251; 'We are of the opinion that the parol testimony to the effect that defendant was told that he would not have to pay the note was inadmissible as tending to vary the terms of the written instrument. The note says, "Four months after date I promise to pay." The testimony that it was stated that the bank would take care of it tends to contradict this agreement. In Handley v. Drum, 237 Ill. App. 587, the court considered this question with a thorough study of many cases.'"

We are of the opinion that the court was fully justified in rejecting the testimony offered, and in confirming the judgment upon the verdict of the jury for \$906.42, which, as we understand the record, was for less than the face of the note.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

• 1000 •

37028

HUNTER PACKING COMPANY, a corporation,

Appellee,

v.

NORTH WESTERN PACKING COMPANY, a
corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

277 I.A. 615³

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant corporation from a judgment of the Superior Court of Cook County against it for the sum of \$8,500 and costs of suit. The action is in assumpsit, and is based on an alleged agreement between the East Side Packing Company, a corporation of East St. Louis, Illinois, (the name of which was subsequently changed to the Hunter Packing Company), plaintiff and defendant company, for the purchase from plaintiff by defendant of certain hams, which contract plaintiff claims was breached, and that it thereby suffered damage. The cause was heard on an amended declaration filed July 3rd, 1931, containing three counts.

The first count charges in substance that on November 21, 1930, and December 16, 1930, plaintiff sold to defendant 20 carloads of green hams, 6 carloads of 30,000 pounds per carload at \$15.25 per 100 pounds, and 14 carloads of 30,000 pounds per carload at \$15.50 per 100 pounds; that the sales were made pursuant to certain memoranda of agreement between the parties, made by Lee & Waldron, provision brokers of Chicago, Illinois, such memoranda being designated as "bought and sold notes". It is alleged that all the hams were to be paid for by defendant upon delivery, and that plaintiff promised to deliver the hams to defendant at its place of business in Chicago, and that defendant promised to accept and pay for the same; that on January 3, 1931, plaintiff shipped one carload of such

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

IN RE: [illegible]

vs.

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

[illegible]

378 I.A. 615

Opinion filed Oct. 23, 1934

UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA

IN RE: [illegible]

of the Supreme Court at New York City, New York

\$8,500 and costs of suit. The petition is to compel

an alleged partnership between the said [illegible]

corporation of West [illegible] (the name of which was

subsequently changed to the United [illegible])

defendant company, for the purpose of recovery of

certain sums, which various parties claim are due

it thereby alleged. The facts are as follows:

Declaration filed July 26, 1934, containing facts stated.

The first count alleges is summarized as follows:

1930, and December 16, 1930, [illegible] was in possession of

of green house, a parcel of 27,500 square feet owned by [illegible]

100 shares, and is entitled to 10,000 pounds and interest at 10.00%

per 100 pounds; that the said [illegible] was entitled to certain sums

under a judgment between the parties, made by the [illegible]

provision powers of attorney, [illegible], which contained a provision

dated as above and also stated. It is alleged that all the sums

were to be paid to [illegible] who delivered, and that [illegible]

promised to deliver the same as evidenced by the fact of [illegible]

is alleged, and that [illegible] promised to deliver the same as [illegible]

sums; that on January 17, 1931, [illegible] advised that [illegible]

hams with the net weight of 30,000 pounds at \$15.25 per 100 pounds; on January 9, 1931, one carload with the net weight of 30,010 pounds at \$15.25 per 100 pounds; on January 16, 1931, one carload with the net weight of 30,141 pounds at \$15.25 per 100 pounds and on January 23, 1931, one carload with the net weight of 30,018 pounds at \$15.25 per 100 pounds; that defendant accepted such shipments; that on or about February 6, 1931, plaintiff was ready and willing to make further shipments and offered to make the same in accordance with the agreement, and requested defendant to accept the further shipments and pay for the same, but that defendant repudiated the contract and would not at any time thereafter accept any of the additional shipments, or pay for the same, with the result that plaintiff was forced to resell the hams at a great loss to plaintiff. The second count is substantially the same as the first, except that it alleges in terms that the brokers were the agents of defendant. The third count is for goods, wares and merchandise sold and delivered.

Defendant denies that it purchased the 20 carloads of hams, as alleged, or that Lee & Waldron were its authorized agents and brokers, and as such, were authorized on behalf of defendant to buy the hams, and denies that it accepted and paid for the 4 carloads mentioned as a part performance of the alleged contract; denies that the plaintiff resold the hams within a reasonable time after defendant's refusal to accept the same, and denies that plaintiff is entitled to recover for the difference between the contract price and the resale price of the 17 cars set forth, and that inasmuch as it accepted 4 carloads of hams, the limit of its, defendant's, liability would be on the sale of 16 cars. Defendant also pleads in defense the Statute of Frauds, and states that inasmuch as the contract is for the sale of goods to the value of \$500 and upwards, and that in view of the fact that it did not accept any part of the goods

... with the ... of ...
... on January 2, 1961, ...
... at 110.25 per ...
... net weight of 20,241 pounds ...
... 25, 1961, one ...
... per 100 pounds; ...
... about February 6, 1961, ...
... further ...
... the ...
... ...
... ...
... additional ...
... ...
... The second ...
... it ...
... The third ...
... ...
... as ...
... brokers, ...
... the ...
... ...
... that the ...
... ...
... ...
... and the ...
... it ...
... finally ...
... defined ...
... first ...
... that in view of the ...

or actually receive the same, and did not pay any earnest money to bind the contract, it is, therefore, not bound by the alleged agreements. The cause was submitted to a jury, and while plaintiff claims its proved damages amount to the sum of \$11,750, the jury returned a verdict in its favor of but \$8,500.

While there is considerable contrariety of testimony, still the evidence adduced tends to establish the fact that in November, 1930, Joseph Cyze, secretary and buyer for defendant company, in various conversations with Z. K. Waldron of Lee & Waldron, brokers, told Waldron that defendant company desired to and did agree to purchase certain green hams to be delivered at various times, and that Cyze stated to Waldron the times of desired shipments and amounts; that thereafter and after conferring with an officer of plaintiff company which agreed to make the sale, Lee & Waldron then mailed to each of the parties the memoranda referred to in the declaration as "bought and sold notes"; that the total of such purchase amounted to 20 carloads of approximately 30,000 pounds each; that in January, 1931, 4 carloads of these hams were shipped to defendant by plaintiff, received and paid for by it, and that on February 6, 1931, another car was shipped to defendant and rejected by it.

Lacy Lee of the firm of Lee & Waldron, testified in substance that about January 3, 1931, Cyze requested him by telephone to procure a cancellation of the contract because the market had gone down, and defendant could not stand the loss; that he, Lee, thereafter had a talk with Mr. Hunter, president of plaintiff company, and that on January 3, 1931, Lee informed Cyze that Hunter declined to cancel the contract. Lee further testified that he told Cyze that if defendant would take 10 cars of hams instead of 20 and sign a confirmation agreement to that effect, he, Lee, would attempt to bring about such an arrangement with plaintiff company; that he did confer with

or actually received the same, and his way of life was such that he was not likely to have been able to do so. The court, in its opinion, found that the defendant had been able to obtain the money in question, and that he had been able to do so in a way that was not likely to have been discovered by the authorities. The court also found that the defendant had been able to do so in a way that was not likely to have been discovered by the authorities.

While there is considerable evidence to suggest that the defendant was able to obtain the money in question, the court found that the evidence was not sufficient to establish that the defendant was able to do so in a way that was not likely to have been discovered by the authorities. The court also found that the defendant had been able to do so in a way that was not likely to have been discovered by the authorities.

and that the defendant had been able to do so in a way that was not likely to have been discovered by the authorities. The court also found that the defendant had been able to do so in a way that was not likely to have been discovered by the authorities.

Another case in which the defendant was able to obtain the money in question, the court found that the evidence was not sufficient to establish that the defendant was able to do so in a way that was not likely to have been discovered by the authorities. The court also found that the defendant had been able to do so in a way that was not likely to have been discovered by the authorities.

and that the defendant had been able to do so in a way that was not likely to have been discovered by the authorities. The court also found that the defendant had been able to do so in a way that was not likely to have been discovered by the authorities.

plaintiff, and that Mr. Hunter president of plaintiff company signed such an agreement and that it was mailed to the defendant; that thereafter he, Lee, discussed this proposed contract with Cyze a number of times, but that it was never signed and returned. None of this evidence is disputed, except that Cyze testified in substance that he told Lee that his firm was unable to make banking arrangements, and that therefore, defendant was unable to proceed with the contract.

Defendant advances the theory that on February 6, 1931, defendant definitely made known to plaintiff that he would take no more of these hams, and that therefore, plaintiff was not justified in further "manufacturing" them. The evidence does not support this contention. As late as March 2, 1931, plaintiff insisted that defendant give plaintiff shipping instructions, which, according to the evidence, defendant never did. As stated, the evidence of defendant's refusal to comply with its contract, relied on by defendant in this regard, is the rejection by it of the one car on February 6, 1931. Why this car was rejected, does not appear from the record.

It appears that these "bought and sold notes" consisted of a series of six documents showing three sales. Each transaction was represented by two documents, one denominated a "bought note", and one a "sold note". The testimony is to the effect that in each instance the "sold note" was sent by the brokers to the plaintiff company, and the "bought note" to the defendant company, and that these documents indicated the sale by plaintiff and the purchase by defendant of 20 carloads of green hams of approximately 30,000 pounds per carload at the price of \$15.25 per hundred pounds for the first six cars and \$15.50 per hundred pounds for the remainder.

It is insisted by defendant that these documents do not constitute a written contract within the Statute of Frauds. There is no dispute, however, as to the amounts of hams purchased, or the price to be paid, as shown by these documents. It is also claimed by

defendant that Cyze was without authority to make the alleged purchase on behalf of defendant.

In Eau Claire Canning Co. v. Western Brokerage Co., 213 Ill. 561, "bought and sold notes" are defined, and their legal significance and effect indicated, as follows:

"'Bought' and 'sold' notes have been defined to be 'written memoranda of a sale of goods, delivered to the parties thereto by the broker employed to negotiate the sale.' (4 Am. & Eng. Ency. of Law, - 2d ed. - p.751). Generally the memorandum delivered to the buyer is the bought note, and that delivered to the seller is the sold note, but some authorities hold that the sold note is delivered to the buyer and the bought note to the seller. (Ibid.; Story on Agency, sec. 28.) The latter view was taken by this court in Saladin v. Mitchell, 45 Ill. 79, where the court, after defining a broker as 'an agent employed to make bargains and contracts between other persons in matters of trade, for a compensation commonly called brokerage,' and as a mere negotiator between other parties, who never acts in his own name, but in the names of those who employ him, and, when he is employed to buy or sell goods, is not entrusted with the custody or possession of them, and is not authorized to buy or sell them in his own name, used the following language (p.83): 'He is a middle man, and, for some purposes, is treated as the agent of both parties. Where he is employed to buy and sell goods, it is the custom to give the buyer a note of the sale, called a "sold note," and to the seller a like note, called a "bought note," in his own name, as agent of each, whereby they are respectively bound, if he has not exceeded his authority.'"

The above case is cited as authority, and the same conclusion is reached in Prairie State Grain & Elevator Co. v. Wrede, 217 Ill. App. 407, and in Abeles & Taussig Lbr. & Tie Co. v. Northwest Side Lbr. Co. 239 Ill. App. 623. Further, the record indicates that the contract was ratified by defendant by its acceptance of the four cars which it paid for. There is no evidence of any agreement as to the four cars other than that made through the "bought and sold" notes. As to the effect of this act by defendant, in Eau Claire Canning Co. v. Western Brokerage Co., supra., the court makes the following statement:

"Again, the conduct of plaintiff in error amounts to a ratification of the contract, evidenced by the 'bought and sold notes.' *** 'Ratification is equivalent to previous authority. It operates upon the act ratified in the same

manner as though the authority had been originally given.'
 ***Where a principal, upon being informed of an unauthorized act of another in his behalf, does not give notice of his non-concurrence within a reasonable time, he is held to assume the responsibility for the act thus reported."

It is apparent from the record that the action of defendant's agent Gyze, defendant's failure to return the proposed modified contract, and its failure to give plaintiff further shipping orders, gave plaintiff every reason to believe that defendant had ~~been~~ concluded not to proceed further with its agreement for the purchase of these hams. There is nothing in the record to indicate that at this time these hams were not "manufactured" (a term used by defendant) and were ready for delivery. On the contrary, the evidence leads us to conclude that at all times plaintiff was ready, willing and prepared to make deliveries as agreed, and as defendant should direct. The evidence is to the effect that after insisting upon defendant giving further shipping directions, and receiving no reply from defendant, plaintiff, at various times, in good faith and expeditiously, resold the merchandise at the fair and best obtainable prices as of the dates of the various sales, at prices which indicated a difference between the prices agreed to be paid by defendant and the prices received, of approximately \$11,000.00. The verdict was for \$8,500.00, upon which judgment was entered. The jury was fully and fairly instructed, and the judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

37069

EDWARD MENKIN,

Appellee,

v.

MURIEL CONNELLY AND HERMAN F.
WINKELMAN,

(Defendants).

On Appeal of HERMAN F. WINKELMAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

277 I.A. 615⁴

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment by confession for \$2,292.50, entered November 22nd, 1932, in the Municipal Court of Chicago against Muriel Connelly and Herman F. Winkelman, defendants. The judgment is for rent for the months of June, July, August, September, October and November, 1932, and was entered under the warrant of attorney contained in a written lease. After motions questioning the jurisdiction of the court and charging a material variance between the cognovit and the warrant of attorney in the lease were overruled by the trial court, defendant Winkelman on January 18th, 1933, presented a motion to vacate the judgment by confession. This motion was supported by a sworn petition, and was continued from time to time.

Pending the motion to vacate this judgment, plaintiff caused judgment to be entered on the same lease for the months of December, 1932, and January, 1933, in one case, No. 2378914 in the Municipal Court of Chicago, and for the months of February and March, 1933, in case No. 2381678 in the Municipal Court of Chicago. A motion was made to consolidate these three actions for the reason that they involved the same subject matter. This motion was continued, to be heard with a motion to vacate the judgment in the instant case.

• *U. l. l.*

0 opinion filed Oct. 23, 1934

1997-1998

to the... ..

The judgment is for the sum of \$100,000.

... ..

... ..

1. The first step is to identify the problem. It is not enough to simply state the problem; you must also identify the specific aspects of the problem that you are trying to solve.

variance between the two

Всего в 1980 году было получено 6 заявок на изобретения и 7 патентов.

[illegible]

THE UNIVERSITY OF CHICAGO

(continued)

On April 7th, 1933, plaintiff filed a plea in which he asserted that a judgment of the Municipal Court entered November 2nd, 1932, in an action on the lease in question for the rent for the months of March and April, 1932, between the same parties, and where the issues were identical, was res adjudicata of the case at bar. This judgment of November 2nd, 1932, was then pending on appeal to this court, and Winkelman, defendant, moved the trial court to defer consideration of his motion to vacate the judgment by confession in this cause and of plaintiff's plea of res adjudicata until this court rendered its decision in Appellate Court cause No. 36592, which involved the judgment of November 2nd, 1932.

On May 31st, 1933, the trial court entered an order denying Winkelman's motion to consolidate the three causes then pending in the Municipal Court, and denied Winkelman's motion to postpone consideration of the issues involved in the case at bar until this court had determined the appeal in Appellate Court cause No. 36592. This order also denied Winkelman's motion to vacate the judgment entered by confession and sustained plaintiff's plea of res adjudicata. The appeal in the instant case then followed, together with appeals from the judgments in the other two cases. They are here numbered 37069, 36070 and 36071, respectively. They have been consolidated for this hearing, and this opinion will be decisive of the three cases.

On March 14th, 1934, this court filed its opinion in Appellate Court cause No. 36592, affirming the judgment by confession entered by the Municipal Court November 2nd, 1932, on the warrant of attorney contained in the lease in question for the period there involved, which is as stated, for a period prior to the three periods involved here.

The material allegations of Winkelman's petition to vacate the judgment by confession entered in this cause, which are substantially

On April 27th, 1935, Plaintiff filed a bill in equity to restrain Defendant from
a judgment of the Municipal Court entered November 2nd, 1932, in
an action on the issue in question and to set aside the verdict of
March and April, 1932, between the same parties, and award the issue
there judicially, the entire bill of the case of No. 1. This judgment
of November 2nd, 1932, was then pending on appeal in this court,
and Plaintiff, Defendant, moved the trial court to enter consideration
of his motion to vacate the judgment by proceeding in this manner
and of Plaintiff's plea of res judicata which was then entered
the decision in People's Court No. 1932, which involved the
judgment of November 2nd, 1932.
On May 1st, 1935, the trial court entered the order setting
Plaintiff's motion to annul the same and the same being in
the Municipal Court, and denied Plaintiff's motion to set aside the
affirmance of the issue involved in the case of No. 1. This
court has determined the issue in People's Court No. 1932,
This order also limited Plaintiff's action to return the judgment
entered a judgment and affirmed Plaintiff's plea of res judicata.
The appeal in the instant case was then taken, together with appeal
from the judgment in the other two cases. They were here numbered
1935, 1936 and 1937, respectively. They have been consolidated for
this hearing, and this opinion will be decided of the three cases.
On March 14th, 1936, the court filed its opinion in
Plaintiff's Court case No. 1935, reversing the judgment of consideration
entered by the Municipal Court November 2nd, 1932, on the basis of
attorney retained in the issue in question for the purpose of
voiding, which is an error, that motion prior to the time before
involved here.
The entire bill of Plaintiff's motion to vacate
the judgment by consideration entered in this case, which the Municipal

the same as those asserted in his behalf in his endeavor to vacate the judgment of November 2nd, 1932, are that he was sixty-eight years of age and had never had experience, either in leasing or operating rooming houses; that plaintiff prepared the lease in question pursuant to an arrangement between him and defendants; that Winkelman, at the solicitation of plaintiff, without reading the lease and without any consideration therefor, signed his name as a guarantor, as he believed, and for no other purpose, but simply as an accommodation to the other defendant, Muriel Connelly; that he is obliged to use spectacles or eye glasses in order to read and that he did not have them with him at the time of the execution of the lease; that he told plaintiff that he could not see to read without his glasses, and that plaintiff then advised him that it was unnecessary that he read the lease and hurriedly urged him to sign it; that his agreement with plaintiff was that he was to sign a lease for eight months as a guarantor, and not a lease for thirty-two months as a lessee; and that at the time he signed the lease he did not know of its provisions nor of the capacity in which he signed same.

A careful examination of the record convinces us that defendants' contentions that there was a material departure in the cognovit from the warrant of attorney contained in the lease, and that the affidavit of the execution of the lease did not sufficiently allege facts to show such execution, are clearly without merit. As to the former, we are impelled to hold that the power to confess the judgment in this cause was clearly given and strictly pursued, and as to the latter, that the essential material facts as to the execution of the lease were definitely and sufficiently stated.

[illegible]

It has heretofore been shown that the decision of this court affirming the judgment of November 2nd, 1932, for rent for an earlier period under the lease, had not been rendered when the final order was entered by the trial court in the instant case. That judgment has been affirmed, however, since this appeal was perfected, and, inasmuch as the same lease was involved, that the action was between the same parties, plaintiff and defendant, and the identical issues were presented for determination there as here, the judgment of this court in Appellate Court cause No. 36592 is a definite adjudication of the issues presented and are binding and conclusive on this court on the determination of the instant appeal.

This court held, in its opinion filed in cause No. 36592:

"The record does not show that any artifice or trick was used by any one in procuring defendant's signature to the lease in question. The extent of this case made in his petition to set aside the judgment in this regard is that he was induced to sign a writing which he did not read, and this is no defense."

For the reasons indicated herein, the judgment and order of the Municipal Court are affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

37070

EDWARD MENKIN,

Appellee,

v.

MURIEL CONNELLY AND HERMAN F.
WINKELMAN,

(Defendants).

On Appeal of

HERMAN F. WINKELMAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

277 I.A. 616¹

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

For the reasons stated in the opinion filed in No.
37069, the judgment and order of the Municipal Court are affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

H

~~SECRET~~

STUDY

RESEARCH CENTER

RESEARCH

1

RESEARCH CENTER

(RESEARCH)

ON 10001 02

RESEARCH CENTER

RESEARCH

Opinion filed Oct. 23, 1934

RESEARCH CENTER

RESEARCH CENTER

RESEARCH CENTER

RESEARCH

RESEARCH CENTER

37071

EDWARD MENKIN,

Appellee,

v.

MURIEL CONNELLY AND HERMAN F.
WINKELMAN,

(Defendants).

On Appeal of

HERMAN F. WINKELMAN,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

277 I.A. 616²

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

For the reasons stated in the opinion filed in No.
37069, the judgment and order of the Municipal Court are affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

Handwritten mark resembling a large 'H' or '4'.

OFFICE OF THE

PROSECUTOR GENERAL

IN CHARGE

STATE OF TEXAS

Opinion filed Oct. 23, 1934

THE STATE OF TEXAS, by and through the Attorney General, vs. the Defendant, for the purpose of obtaining the judgment and order of the court in the following case:

VERIFICATION

STATE OF TEXAS, by and through the Attorney General, vs. the Defendant, for the purpose of obtaining the judgment and order of the court in the following case:

THE STATE OF TEXAS, by and through the Attorney General, vs. the Defendant, for the purpose of obtaining the judgment and order of the court in the following case:

37084

NEW ENGLAND MUTUAL LIFE INSURANCE
COMPANY, a Corporation,

(Complainant) Appellee,

v.

JOHN W. KEOGH, et al.,

(Defendant) Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

277 J.A. 616³

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure, confirming a master's report, and ordering the sale of the property involved. The bill alleges that defendant became indebted to complainant in the sum of \$250,000, evidenced by a promissory note for that amount dated December 24th, 1925, payable on December 1st, 1930, with interest at the rate of 5% per annum until maturity, and at the rate of 7% per annum after maturity. It is also alleged that to secure the debt, defendant executed a mortgage on certain property described in the bill, dated December 24th, 1925; that on November 19th, 1930, an agreement was entered into between the parties extending the time for the payment of the principal note to December 15th, 1933, and at the same time, certain interest coupon notes were executed by defendant, evidencing the interest agreed to be paid. The mortgage contains a covenant that upon the occasion of certain defaults, including defaults in the payment of interest and taxes on the mortgaged property, that the mortgagee might declare the entire indebtedness due. The bill was filed December 20th, 1932, and charges default in the payment of interest and taxes, and alleges that the mortgagee has elected to declare the entire unpaid balance due and payable.

Defendant filed an answer in which he admits the making and delivery of the principal and interest notes described in the bill of complaint, and that he executed the mortgage, as alleged;

NEW HOLLAND TRUST CO. INCORPORATED
COMPLAINANT, v. DEFENDANT

(Complainant) vs. (Defendant)

JOHN A. LEE, et al.,
Defendants

CHANCERY COURT

3771A.616

Opinion filed Oct. 28, 1934

... This is an appeal from a decree of foreclosure, and the ...
 a master's report, and ordering the sale of the property involved.
 The bill alleges that defendant became indebted to complainant in
 the sum of \$100,000, evidenced by a promissory note for that amount
 dated December 24th, 1923, payable on December 1st, 1930, with
 interest at the rate of 10 per annum until maturity, and at the
 rate of 7 1/2 per annum after maturity. It is also alleged that the
 account the debt, defendant executed a mortgage on certain property
 described in the bill, dated December 24th, 1923; that on November
 16th, 1930, in violation of the terms of said mortgage
 extending the time for the payment of the principal note to December
 16th, 1933, and at the same time, certain interest accrued under note was
 extended by defendant, extending the interest period to be paid.
 The mortgage contains a covenant that upon the expiration of certain
 definite, including defaults in the payment of interest and taxes on
 the mortgaged property, that the mortgagee might exercise the entire
 indebtedness due. The bill was filed November 16th, 1933, and
 ordered default in the payment of interest and taxes, and likewise
 that the mortgagee was allowed to exercise the entire mortgage balance
 due and payable.

Defendant filed an answer in which he denies the making
 and delivery of the aforesaid and interest notes mentioned in the

but states that both were dated December 3rd, 1925. The defaults alleged in the bill of complaint are not disputed, but nevertheless defendant denies that the principal sum of \$250,000 is due and payable.

On February 24th, 1933, defendant filed a cross bill in which he makes allegations as to the making of the notes and mortgage and his defenses to the bill, which, in effect, are the same as are set forth in his answer and the same in substance as the points raised here, which are "that the trial court erred in refusing to admit evidence, that the complainant did not have a privilege license as a foreign corporation to do mortgage loan business in the state of Illinois; that it was without authority to invoke the jurisdiction of the court over the parties and the subject matter; that the trial court was entirely without jurisdiction either of the parties or of the subject matter, and was without authority to grant the relief prayed in the bill of complaint, to refer the issues to a Master in Chancery, to approve the Master's report, and to enter a decree of foreclosure and sale of the defendant's property, by reason of the fact that the Supreme Court of the State of Illinois is not a de jure Supreme Court in that Articles 4, 6 and 9 of the Constitution of the State of Illinois and Article 4, Section 4, of the Constitution of the United States have all been violated; that the Masters in Chancery Act of 1872 (Illinois Revised Statutes, Chap. 90) is unconstitutional, and the reference of the issues to a Master in Chancery, his report under said reference, and the entry of the decree approving the report and based thereon, are null and void; that even if the act be constitutional, the court could not refer the issues over the objection of the defendant; that the decree is ambiguous and erroneous on its face, in that it finds \$289,163.42 as the total indebtedness in one part of the decree and \$287,163.42 in another part; that the nature of the issues before this court

but states that from the date December 31, 1932, the defendant
alleged in the bill of commodities was not admitted, but nevertheless
defendant claims that the principal sum of \$100,000 is now and was
due.

On February 24, 1933, defendant filed a cross bill in
which he makes allegations as to the making of the notes and mortgage
and his defense to the bill, which, in effect, are the same as are
set forth in his answer and are also in substance as the points
raised here, which are that the trial court erred in refusing to
admit evidence, that the court in its judgment has made a mistake of law
as a foreign corporation to be brought in business in the state
of Illinois; that it was without authority to invoke the jurisdiction
of the court over the parties and the subject matter; that the trial
court was entirely without jurisdiction either of the parties or of
the subject matter, and was without authority to grant the relief
prayed in the bill of commodities, to enter the decree to a decree
in rem, to remove the property, and to enter a decree
of foreclosure and sale of the defendant's property, by reason of
the fact that the Court is not of the state of Illinois in not
its jurisdiction over the parties and the subject matter, and by reason of
the fact that the Court is not of the state of Illinois in not
of the state of Illinois and Article 4, Section 4, of the Constitution
of the United States have all been violated; that the parties in
dispute are of 1933 (Illinois Revised Statutes, Chap. 100) is
unconstitutional, and the reference of the issues to a master in
Chancery, the report under said reference, and the entry of the
decree reversing the report and awarding the property, are null and void;
that even if the bill be constitutional, the court could not enter
the decree over the objection of the defendant; that the decree is
null and void and erroneous in its law, in that it takes \$100,000
as the total indebtedness in one part of the answer and \$100,000

on appeal is such that they must be certified by it to the Supreme Court of the State of Illinois in order that they may be certified by that court to the Supreme Court of the United States."

After the bill of foreclosure was filed, the court on motion of complainant, appointed a receiver for the property pendente lite. An interlocutory appeal to this court was taken from the order of appointment, and the same questions were raised in that proceeding as to the jurisdiction of the Superior Court of Cook County as are raised here. This court affirmed the order appointing the receiver, (New England Mutual Life Ins. Co. v. Keogh, No. 36782) and as to the question of the jurisdiction of the Superior Court to entertain the bill, said:

"But the main contention of Keogh, here urged, is that the Superior Court erred in the appointment of any receiver pendente lite of the premises, because that court was 'without jurisdiction' to entertain complainant's bill (a common and ordinary bill to foreclose a mortgage) for the reasons stated (as above outlined) in his answer, and in his subsequently filed motion to dismiss said bill which the court denied. We find no merit in the contention. That a court of general jurisdiction, such as the Superior Court of Cook County, may entertain a bill for the foreclosure of a mortgage on real estate, and may also upon a proper showing appoint a receiver pendente lite to collect the rents and to preserve the property from waste, etc., is unquestioned. And we are not impressed with the force of any of the reasons stated by Keogh for his contention."

This question of the jurisdiction of the Superior Court having been determined in the affirmative, it will not be necessary to further consider it.

The cause was referred to a Master upon the bill, answer and cross bill to take evidence and report his findings of law and fact. The Master made his report and a hearing was had by the court on exceptions thereto. Upon this hearing, defendant raised the point that complainant was without authority to prosecute its suit, for the reason that it was not licensed to loan money in Illinois, and offered in evidence the license issued by the State of Illinois to

the complainant to do a life insurance business in this state. As this hearing was upon exceptions to the Master's report, and nothing else, the court refused to admit this evidence. On the point raised, however, we call attention to the fact that there is no law in this state which requires any corporation to obtain a license to loan money in the state. Cahill's Revised Statutes, 1933, chapter 32, paragraph 299, section 1, entitled, "An Act to enable corporations in other states and countries to lend money in Illinois to enforce their securities and acquire title to real estate as security," approved May 24, 1897, provides:

"That any corporation formed under the laws of any other state or country, and authorized by its charter to invest or loan money, may invest or loan money in this state. Any such corporation that may have invested or lent money as aforesaid, may have the same rights and powers for the recovery thereof, subject to the same penalties for usury, as private persons, citizens of this State; and when a sale is made under any judgment, decree or power in a mortgage or deed, such corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title wherever a natural person might do so in like cases: Provided, however, that all real estate so purchased by any such corporation in satisfaction of any such liability or indebtedness shall be offered at public auction, at least once every year, at the door of the court house of the county wherein the same may be situated, or on the premises so to be sold, after giving notice thereof for at least four consecutive weeks in some newspaper of general circulation, published in said county; and if there be no such newspaper published therein, then in the nearest adjacent county where such newspaper is published; and said real estate shall be sold whenever the price offered for it is not less than the claim of such corporation, including all interest, costs and other expenses: And, provided, further, that in case such corporation shall not, within the period of five years after acquiring such title, sell such lands, either at public or private sale, as aforesaid, it shall be the duty of the State's Attorney to proceed by information, in the name of the People of the State of Illinois, against such corporation in the circuit court of the county within which such land, so neglected to be sold, shall be situated, and such court shall have jurisdiction to hear and determine the fact, and to order the sale of such land or real estate, at such time and place, subject to such rules, as the court shall establish. The court shall tax, as the fees of the State's Attorney, such sum as shall be reasonable; and the proceeds of such sale, after deducting the said fees and costs of proceedings, shall be paid over to such corporation: And, provided, further

that nothing in this act contained shall be so construed as to confer banking powers or privileges upon any such corporation."

We are of the opinion that the court was not in error in refusing to admit the certificate in evidence, and that the complainant is authorized by the statute, just quoted, to prosecute its suit to completion, as there provided.

Defendant raises the point that there is uncertainty in the decree. He claims that in one place the court finds that his debt amounts to \$289,163.42, and that in another place it amounts to \$287,163.42. An examination of the decree indicates that the court found the amount due by defendant to complainant to be \$287,163.42, and we found no difficulty in determining this from the decree.

Defendant, appellant here, also raises the question as to the constitutionality of the "Act concerning masters in chancery." In Kowalozyk v. Swift & Co., 317 Ill. 312, the Supreme Court said: "When the party defeated in the trial court appeals to the Appellate Court he waives the right to raise a constitutional question in that court." This question, therefore, is not properly before us. The decree of the Superior Court of Cook County is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

that nothing in this case warranted such a conclusion
as to either party's position on the
question.

The view of the court that the party was not in error in
refusing to admit the defendant's evidence, and that the defendant
was not misled by the plaintiff's evidence, is
entirely correct.

Defendant claims that the plaintiff is responsible for
the delay. He claims that in one place the court finds that
about January 10, 1937, the plaintiff is another place it appears to
be 1937, 1938. An examination of the record indicates that the court
found the amount due by defendant to plaintiff to be \$507,100.00,
and we found no difficulty in establishing this from the facts.

Defendant, Plaintiff, also raises the question as to
the constitutionality of the "of defendant's estate in chapter."
In Boyle v. Boyle, 17 Ill. 2d, the Supreme Court said:
"When the party defeated in the defendant's estate in the plaintiff
Court he waives the right to raise a constitutional question in
that court." This question, therefore, is not properly before us.
The decree of the Superior Court of Cook County is affirmed.

Witness my hand and seal of the Court at Chicago, Illinois, this 10th day of June, 1938.

ROBERT J. ROY, J. CLERK.

37117

J. WILLIAM FELDMANN,

(Complainant) Appellee,

v.

YETTA SILVER ANDALMAN, MAXWELL N.
ANDALMAN, JULIUS ANDALMAN and
FRED K. GREENBERG,

(Certain Defendants) Appellants.

APPEAL FROM

CIRCUIT COURT

277 COOK COUNTY I.A. 616^H

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree entered in favor of complainant in a foreclosure proceeding. The trust deed for the foreclosure of which the proceeding was instituted, was executed by Yetta Silver Andelman and her husband, Maxwell N. Andelman, to secure a principal note of \$8,000 and a series of interest notes, also executed by these two defendants. The deeds and notes were dated March 29th, 1929, and the principal sum became due three years after that date. The interest agreed to be paid was 7% from the date of the principal note, and was payable semi-annually.

In the answer filed on behalf of defendants, Yetta Silver Andelman and Maxwell N. Andelman, it is alleged in substance that complainant holds the notes as a sham and a pretense for one Henry G. Zander; that the transaction was usurious in that there was exacted and paid by Yetta Silver Andelman and Maxwell N. Andelman usury in sum of \$560.00, and that defendants received only the sum of \$7,540; that the defendants are entitled to have credited against the \$7,540 all payments made since March, 1929, which is approximately \$2,260, and that their indebtedness is only about \$5,750; that because of the usury paid and the fact that the complainant is not the owner of the said notes and mortgage, complainant is not entitled to any relief in equity.

The cause was referred to a master, who heard the evidence

J. WILLIAM (Name)

(Occupation) Address

V.

YETTA SILVER (Name)
KNOXVILLE, TENNESSEE
JANUARY 1, 1934

(Certain references) (Name)

Opinion filed Oct. 23, 1934

MR. JUSTICE WILLIAM (Name) of the Court.

THIS is an appeal from a decree entered in favor of the

plaintiff in a foreclosure proceeding. The facts are as follows:

Plaintiff of which the proceeds are invested, was executed by

Yetta Silver (Name) and her husband, (Name), to

secure a principal note of \$5,000 and a series of interest notes,

also executed by these two defendants. The notes and other

dated March 25th, 1932, and the principal was secured by three years

after that date. The interest was to be paid on the 1st of

date of the principal note, and the principal was to be paid

in the event of default of defendant, Yetta Silver

and her husband, (Name), it is alleged in substance that

defendant holds the notes as a loan and a promise for one year

to pay the same. The transaction was consummated in that there was a

and said of Yetta Silver (Name) and her husband, (Name) in

sum of \$5,000.00, and that defendant received only the sum of \$2,500.00

that the defendant was entitled to have credited against her \$2,500.00

all payments made since March, 1932, which is approximately \$2,500.00,

and that their indebtedness is only about \$2,500.00; that because of the

money paid and the fact that the defendant is not entitled to any relief

is equity.

The court was satisfied in a hearing, who heard the evidence

and found among other things that there was due complainant on account of the principal, interest and costs, the sum of \$8,417.45, together with solicitor's fees in the sum of \$500; that Henry G. Zander & Company, a co-partnership, acted as broker for Yetta Silver Andelman and Maxwell N. Andelman in procuring the loan in question and received a commission therefor; that afterward Charlotte Zander purchased with her own money the indebtedness for \$8,000, its face value; that the evidence failed to show that she received any of the commission, or had knowledge thereof, or that Zander & Company acted as her agent or brokers in making the loan, and the master concluded that the charge of usury was not established by defendants. Exceptions to the master's report were heard by the court, were overruled, and a decree entered confirming such report.

The principal note for \$8,000 signed by Yetta Silver Andelman and Maxwell N. Andelman was made payable to "ourselves", and was endorsed by each of them in blank, which, of course, made this note payable to the bearer.

On the hearing before the master, the notes involved were introduced in evidence by complainant's solicitor, and complainant was asked to whom they belonged, and the answer was, "they belong to myself." On cross-examination, this witness stated, "I did not have them, in my own actual physical possession from the start. I suppose Mrs. Zander kept them in her safety deposit box. I don't know where she keeps them. The first time I saw them was when they were in the office and said they were going to start proceedings against the place, foreclosure. I didn't buy the papers from Mrs. Zander. I never bought them. I own these papers now, but I never bought them. They were not given to me as a present. I tell the Master and for the record that I claim ownership of these papers because they were given to me for collection purposes. I hold these papers for collection purposes, and for no other purpose."

and found some other things that might be the originals in
account of the original, but not the copy, the sum of \$1,000.00
together with defendant's fees in the sum of \$1,000.00.
Lester A. Company, a co-defendant, asked to return the same to
Andersen and himself as witnesses in the case in question
and received a commission order; that defendant's fee was
paid with his own money for the fee of \$1,000.00, the fee
value; that the evidence failed to show that he received any of
the commission, or had anything to do with, or was a party to
acted a part of or profits in making the loan, and the master
concluded that the charge of money was not established by defendant.
exceptions to the master's report were made by the court, were
overruled, and a decree entered confirming such report.
The original note for \$1,000.00 signed by Yette River
Andersen and himself as witnesses in the case in question,
and was introduced by each of them in blank, signed, and
this note payable to the court.
In the hearing before the master, the master introduced
introduced in evidence by defendant's witnesses, and defendant
was asked to show they belonged, and the master said, "they belong
to myself." On cross-examination, this witness stated, "I did not
pay them in my own name, but I received the money from the court.
suppose Mr. Andersen kept them in his safety deposit box. I don't
know where he keeps them. The first time I saw them was when they
were in the office and it was going to start proceedings
against the place, for instance. I didn't buy the papers from Mr.
Andersen. I never bought them. I saw them somewhere else, but I never
bought them. They were not given to me as a payment. I will be
master and for the record that I think something of those papers
because they were given to me for collection purposes. I think these

In Bourke v. Hetter, 202 Ill. 321, cited here by both parties, a bill was filed to foreclose a trust deed. On the hearing in that case, the complainant testified that he was the legal owner of the notes sued on; that they were transferred to him for the purpose of commencing foreclosure proceedings, and that he paid nothing for them. As to the ownership of the notes, this statement is almost the same as that made by complainant in the instant case. In the case cited, the Supreme Court said:

"Appellant insists that it was error in the decree to find that appellee was the legal owner of the notes, and that the real owner should have been made a party to the suit. The notes were payable at the office of Greenebaum Bros., which firm consisted of three brothers, two of them being parties to the suit, both individually and as trustees in the trust deed. The notes were payable to the order of the maker, and were by endorsement made payable to appellee. There was no evidence as to the real owner of the notes. They were in the possession of Greenebaum Bros., and were delivered to appellee for the purpose of bringing suit and he was clothed with the legal title to them. Appellant was not prevented from making any equitable defense she had to the notes, and she was allowed to testify that she never received any consideration for them. The real owner having put the notes in the power of the appellee by having them endorsed to him unconditionally, cannot be heard to complain, and, as we have seen, no harm was done appellant thereby. Had the suit been at law, it would have been brought in appellee's name."

We are of the opinion that the court was not in error in confirming the master's report, and in entering the decree of foreclosure. There is no proof that any usury was charged by either the complainant or by Charlotte Zander. It is not contradicted that the broker was the agent of the defendant, and that any commission paid was paid to this broker. The decree of the Circuit Court is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

[illegible]

circuit Court is affirmed.

1707714

1970-71, 1971-72, 1972-73, 1973-74, 1974-75

37
37273

PEOPLE OF THE STATE OF ILLINOIS, ex
rel JOHN S. RUSCH,

Defendant in Error,

v.

ABRAHAM BENJAMIN, JOSEPH KODIC, ROBERT
BELL and FRANK J. KYZIVAT,

Plaintiff in Error.

ERROR TO

COUNTY COURT,

COOK COUNTY.

277 I.A. 616⁵

Opinion filed Oct. 25, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

September 11, 1933, a petition was filed in the County Court of Cook County in the name of the People of the State of Illinois, ex rel John S. Rusch, chief clerk of the election commissioners, in which it was charged that Abraham Benjamin, Robert Bell, Joseph Kodic, Frank J. Kyzivat and Sarah Cohen, while acting as judges and clerks of election in the 30th Precinct of the 24th Ward in the City of Chicago, at the general election held on November 8, 1932, were guilty of contempt of the County Court in that, while acting as such judges and clerks, they were guilty of making false and unlawful returns as to the vote and were guilty of fraudulent conduct and practices in the performance of their duties. The court found the defendants guilty and fixed the punishment of Sarah Cohen at \$25 and costs and that of the other defendants at 30 days in the county jail. Sarah Cohen paid her fine and the judgment was satisfied so far as she was concerned. The other defendants have appealed from the order of the County Court and the matter is before us for consideration.

Following the election a re-count was had upon a contest, by certain candidates for judge of the Municipal court of Chicago. The judicial election was held at the same time as the general election and at this re-count the tally sheets, poll books and re-count sheets, being a summary of the votes cast, were introduced in evidence,

OFFICE OF THE CLERK OF THE COUNTY OF JEFFERSON, MISSOURI
REL JAMES E. BROWN

Defendants in Error,

v.

LESLIE B. BROWN, JAMES E. BROWN, ROBERT E. BROWN,
JAMES E. BROWN, JR., and others, Plaintiffs in Error.

Plaintiffs in Error.

27773, A. 618

Opinion filed Oct. 28, 1934

MR. JUSTICE MURPHY delivered the opinion of the court.
September 11, 1934. A petition was filed in the County

Court of Cook County in the name of the People of the State of Illinois, et al. John E. Brown, et al., clerk of the election commission, in which it was charged that James E. Brown, Robert E. Brown, Jr., James E. Brown, Jr., and others, while acting as judges and clerks of election in the State of Illinois at the City of Chicago, at the County Election held on November 8, 1933, were guilty of contempt of the County Court in that, while acting as such judges and clerks, they were guilty of willful failure and refusal to return as voters and were guilty of fraudulent conduct and practices in the performance of their duties. The court found the defendants guilty and fined the defendant of James E. Brown \$100 and costs and that of the other defendants \$50 each in the County Jail. James E. Brown and the others were released on bond as far as the law permitted. The other defendants have appealed from the order of the County Court and the matter is being set for consideration.

Following the election a re-count was had under contract,

by certain candidates for judges of the Municipal Court at Chicago.

The judicial election was held at the same time as the general

election and at this re-count the tally sheets, poll books and re-count

sheets, being a summary of the voter list, were introduced in evidence.

From these it appears that there was a considerable discrepancy in the return made by the judges and clerks of election of this precinct and that of the official recount. It was stipulated that the recount figures were correct. The respondents here contend that such errors arose without concert of purpose and without any improper, corrupt or unlawful or wilful intent; that the number of votes at this election was large and that the count for candidates for the Municipal court was reached about 1:30 o'clock in the morning and they were tired and exhausted and that the count was not finished until around four o'clock that morning. The vote for judges of the Municipal court, however, was upon a separate ballot and from the tabulation of figures made upon the re-count in the contest by the candidates, it appears that of these ballots, 250 were straight Democratic and 87 were straight Republican. There were approximately 500 names on the poll books in this precinct. After deducting the number of straight Democratic and Republican votes, it is apparent that there is a wide discrepancy between the correct totals as contained in Peoples' Exhibit 8 and 8a in so far as the scratched and rejected ballots were concerned and the votes credited to the candidates by the respondents here upon their return to the election commissioners. Peoples' Exhibits 8 and 8a are the official figures arrived at in the re-count.

There were 24 candidates in all and but one of these obtained the same count as shown by the figures upon the re-count and those returned by the respondents. The judge of the County court in summing up the facts made the following statement, which we find to be correct:

"Well, gentlemen, the count as made here under direction of the Court and in this court, discloses that Judge Block received 305 votes. The judges and clerks showed he received 261, a difference of 44 votes. Casey received 126 votes by the return of the judges and clerks, whereas the fact is he

3-1-3
1-2-3

[illegible]

received 108. Judge Heller received 132 when in fact he should have been given 160. Judge Schulman received 109 by the return of the judges and clerks when he should have received 132. Judge Fischer received 90 by the return of the judges and clerks, whereas he should receive 117.

The discrepancies there are substantial and are, I think, concrete evidence of misconduct on the part of those judges and clerks making the returns."

It is apparent that the discrepancies are too glaring and too numerous to be susceptible to an explanation consistent with innocence. When it is borne in mind that there are over 3,000 precincts in the City of Chicago, it only involves the question of mathematical computation to show that Bicek would have been credited with 168,000 votes in the City of Chicago if he had maintained such gains in each and every precinct and Heller would have lost 84,000 if the same ratio of loss had been maintained in each precinct of the city. There is also evidence in the record which substantiates petitioner's assertion that the officials in charge of the precinct had failed to canvass the vote in accordance with the city election act. This act provides that the split or scratched ticket should be "canvassed separately by one of the judges sitting between the two other judges, which judge shall call each name to the poll clerks, and the office for which it is designated, the other judges looking at the ballot at the same time, and the poll clerks making tally of the same." If the vote were correct it might not constitute a contempt of court to have violated this provision of the election laws, but where there are discrepancies in the vote, such as appear here, the fact that election officials did not follow the legal directions may be considered together with all the facts and circumstances in the case as indicating a disregard of the law. Failure of precinct officials to observe this enactment when instructed by the County Court so to do, when coupled with discrepancies in the vote and other misconduct, is a fact for the court to consider in arriving at its

judgment as to whether or not the respondents were guilty of contempt.

It is contended by respondents that the finding and judgment of the court are contrary to the weight of the evidence. In the case of People, ex rel Rusch v. Kotwas, et al, decided by the Appellate Court of this District, First Division, Gen. No. 37334, the court in its opinion, said:

"Counsel for the three respondents who prosecute this writ of error contend that 'Mere proof of a discrepancy between the count of the judges and clerks and the recount is not sufficient to sustain a finding of guilty. The burden of proof is on the petitioner to show the guilt of the respondents beyond a reasonable doubt.' Whether the discrepancy between the return made by the judges and clerks and the recount of the ballots is so great as to warrant a finding of misbehavior on the part of the judges and clerks in the instant case, we think was a question of fact for the court."

The testimony in the case at bar was voluminous and the explanations made by the various respondents was heard by the court and it is evident that he was not satisfied with the explanations. He had a better opportunity than has this court of seeing and observing the defendants and their witnesses as well as the witnesses for the People when upon the stand and in weighing their evidence. In a proceeding such as this it was not necessary for the petitioner to prove the guilt of the defendants beyond a reasonable doubt. People v. White, 334 Ill. 465. This court in the case of People, ex rel Rusch v. Kotwas, et al, already referred to, lays down the following rule:

"In a contempt case of this kind, we think the petitioner is not required to prove the guilt of respondents beyond a reasonable doubt, but is required to produce 'most convincing evidence of the truth of the charge' before the respondents could be found guilty, the proceeding being quasi criminal. Oehler v. Levy, 168 Ill. App. 41."

We see no force in the argument that the order failed to recite that the respondents were not present in open court at the time of the entry of the judgment. The order entered October 30, 1933, from which this appeal was taken, recites:

judgment as to whether or not the respondent was guilty of contempt.

It is suggested by respondents that the finding and

judgment of the court are contrary to the weight of the evidence. In

the case of People v. [redacted], decided by the

Appellate Court of this District, First Division, Vol. 10, 272-273,

the court in its opinion, said:

"General for the first respondent - a respondent
and with respect to the fact that the respondent
between the count of the judge and the respondent
is not sufficient to sustain a finding of contempt. The fact
that of fact is on the respondent's side and that at the
respondent's expense is a finding of contempt. The fact that
existing between the respondent and the judge and that
and the record of the evidence is so much as to warrant
a finding of contempt on the part of the judge and
clearly in the instant case, as there was a violation of the
law of the court."

The testimony in the case of the two respondents and the

explanations made by the various respondents was heard by the court and

it is evident that he was not satisfied with the explanations. He

had a better opportunity than the court of seeing and hearing

the defendants and their witnesses and as the witnesses for the

people when upon the stand and in relation to this witness. In a

proceeding such as this it was not necessary for the respondent to

prove the guilt of the defendant beyond a reasonable doubt. People

v. [redacted], 134 Ill. 433. This court in the case of People v. [redacted]

People v. [redacted], 134 Ill. 433, already stated as, like upon the following

rule:

"In a contempt case of this kind, we think the testimony
is not required to prove the 'guilt of the respondent' beyond a
reasonable doubt, but is required to prove 'guilt' and convincing
evidence of the guilt of the respondent, before the respondent
could be found guilty. The respondent must prove his innocence."
People v. [redacted], 134 Ill. 433, 434.

It was so stated in the judgment that the court failed to

realize that the respondents were not present in open court at the

time of the entry of the judgment. The court entered judgment on

1933. From which this appeal was taken. Reversed.

"This cause coming on to be heard upon the rule or order to show cause heretofore entered against the above named respondents, and each of them, the oral answer to said rule or order by the respondents, Abraham Benjamin, Joseph Kodie, Robert Bell, Frank J. Kyzivat and Sarah Cohen, and each of them, now appearing personally in court, and by their counsel, and the evidence of the respective parties presented in open court, and the court having heard the arguments of counsel and being fully advised in the premises, doth find:"

From this statement in the order it is evident that the parties were in open court at the time of the entry of the order. In the case of People v. Whitlow, 272 Ill. App. 7, the court in its opinion said:

"The suggestion that plaintiffs in error were not present in court when sentence was pronounced is without merit.

The second paragraph of the court's order is as follows: 'Whereupon, the defendants, Gola Whitlow, John Moulin and Clyde Lipe, on same day, being in open Court, represented by their attorneys, R. E. Smith and Carl Choisser, the hearing proceeds and sworn testimony is by witnesses presented before the court; after hearing said testimony, both for the People and for the defendants, and being fully advised in the premises, the Court finds:' this is conclusive of this subject."

It is also urged as a ground for reversal that the order is void for the reason that respondents were held guilty of violations of their duties as judges and clerks at an election held on November 8, 1933, a date subsequent to the filing of said petition in said cause and subsequent to the date said cause was tried in court.

March 23, 1934, an order was entered in the County Court correcting the record in order to make it speak the truth and conform to the facts. By this order of March 23, 1934, the original order of commitment was corrected from the memory of the court based upon and refereshed by the minutes and records in the proceeding. The court also should take judicial notice of the fact that the general election was held November 8, 1922 and not November 8, 1933. Moreover, the petition was filed in the cause prior to the last mentioned date, so that it is evident that the date of the original order was a clerical mistake.

The sanctity of elections should be as carefully guarded as it is possible for the courts to so do. It is not always possible to obtain direct evidence as to fraud or corruption nor as to misconduct in the tabulation and recording of the vote. Except for the re-count demanded by some of the candidates at the election in November, 1932, the ballot boxes would not have been opened. The written returns and figures of the clerks speak as loudly as does the testimony of the witnesses. The County Court was of the opinion that the discrepancies were so great as to indicate fraud and corruption, and that the explanations offered were far from satisfactory. There was evidence justifying the finding of the County Court and this court will not disturb it.

For the reasons stated in this opinion the judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

The necessity of a decision should be as carefully guarded as it is possible for the courts to guard. It is not always possible to obtain direct evidence as to intent or conviction but it is almost constant in the tabulation and recording of the votes. Except for the recount demanded by some of the candidates at the election in November, 1932, the ballot boxes would not have been opened. The written returns and figures of the election were as finally as those the testimony of the witnesses. The County Court was of the opinion that the discrepancies were so great as to call for a recount and a decision, and that the explanation offered was not satisfactory. There was evidence justifying the finding of the County Court and this court will not disturb it.

For the reasons stated in this opinion the judgment of the County Court is affirmed.

RECOUNT AFFIRMED.

HEBELL, P. J. AND WALL, J. CONCUR.

37299

THOMAS BLAKE,

(Plaintiff) Plaintiff in Error,

v.

THE ALTON RAILROAD COMPANY, a corporation,

(Defendant) Defendant in Error.

ERROR TO

SUPERIOR COURT,

COOK COUNTY.

277 I.A. 616^b

Opinion filed Oct. 28, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The plaintiff, Thomas Blake, brought his action to recover for personal injuries sustained because of the alleged misconduct and negligence of the defendant, The Alton Railroad Company and its agents. The accident happened on the 8th day of September, 1923, at or near the crossing of the defendant and the Belt Railway Company, about two miles west of Kedzie avenue, where the plaintiff had boarded a freight train operated by the defendant. The cause was submitted to a jury which returned a verdict of not guilty on behalf of the defendant and judgment was entered upon the verdict. Plaintiff has sued out his writ of error to review that judgment and it is now before this court for consideration.

From the testimony it appears that the plaintiff, then of the age of 13 years, together with two other boys, Vincent Gooney and Stanley Kropp, had been playing upon the right-of-way of the defendant company in the vicinity of the Kedzie avenue viaduct. This viaduct was an elevated structure over the street which was reached by a stairway evidently intended for the use of employees. The trains of the company were operated on an embankment and over defendant's own right-of-way. On the day in question these boys in their play upon the right-of-way had been climbing over trains, superstructures and girders over the viaduct and according to the testimony had decided to hitch a train of the defendant for the purpose of going to Hawthorne Race Track in order to witness a prize

THOMAS BLAKE,

(Plaintiff) Plaintiff in Error,

v.

THE ALTON RAILROAD COMPANY, a corporation,

(Defendant) Defendant in Error.

DOOR COUNTY.

277 I.A. 616

Opinion filed Oct. 28, 1934

MR. JUSTICE WILSON delivered the opinion of the court.

The plaintiff, Thomas Blake, brought his action to recover for personal injuries sustained because of the alleged misconduct and negligence of the defendant, the Alton railroad company and its agents. The accident happened on the 15th day of September, 1933, at or near the crossing of the defendant and the plaintiff company, about two miles west of Kaskia avenue, where the plaintiff had boarded a freight train operated by the defendant. The cause was admitted to a jury which returned a verdict of not guilty on behalf of the defendant and judgment was entered upon the verdict. Plaintiff has sued out his writ of error to review that judgment and it is now before this court for consideration.

From the testimony it appears that the plaintiff, then

of the age of 13 years, together with two other boys, Vincent Gooney and Stanley Kropp, had been playing upon the right-of-way of the defendant company in the vicinity of the Kaskia avenue viaduct. This viaduct was an elevated structure over the street which was resorted by a stairway evidently intended for the use of employees. The trains of the company were operated on an embankment and over defendant's own right-of-way. On the day in question these boys in their play upon the right-of-way had been climbing over trains, superstructures and bridges over the viaduct and according to the testimony had decided to hitch a train of the defendant for the

purpose of going to Hawthorne Race track in order to witness a prize

fight which was to be held there on that day. This race track was about two miles from the Kedzie viaduct where the boys boarded the train. The plaintiff, Thomas Blake, and his companions, Cooney and Kropp, continued their journey to the crossing of the Belt Railway by riding on the side of a box car. During the journey the plaintiff stood at the bottom of the ladder of one of the box cars with his foot on a stirrup. This stirrup was about three feet above the track. As the train approached the Belt crossing its speed slackened and Cooney and Kropp jumped off. According to the testimony of Cooney, Kropp ran back of a small shanty on the right-of-way in order to urinate and did not see the accident.

The plaintiff testified that when the train had proceeded to a point about 100 feet west of the Belt Railway crossing, a man known as Burns, a railway detective, descended the ladder on which plaintiff was hanging and kicked him and as a result he fell under the train and sustained the injuries which resulted in the loss of his leg. He further testified that he had no warning of Burns' approach and did not see him before he was kicked; that after the accident he was unconscious and remained so for a period of about two weeks.

Cooney testified that after plaintiff had alighted he again returned to the train and boarded it and as it started to move slowly forward he saw a big tall man coming over the top of the cars from the caboose and saw him go down the ladder upon which the plaintiff was hanging; that his next recollection was that he heard the plaintiff hollering and thereupon he, Cooney, "beat it" toward the shanty where he was caught by the man; that he then saw plaintiff hopping around on one leg between the tracks west of the Belt crossing.

The defendant on its own behalf introduced testimony to the effect that the Sanitary District canal ran along side of the

right which was to be held down on that day. This road track was about two miles from the point where the body passed the train. The plaintiff, Thomas Smith, and his companions, Goney and Erp, continued their journey to the station at the Salt Lake City riding on the side of a box car. During the journey the plaintiff stood at the bottom of the ladder of one of the box cars with his foot on a string. His string was about three feet above the track. As the train approached the point crossing the road appeared and Goney and Erp jumped off. According to the testimony of Goney, Erp ran back of a small building on the right-of-way in order to urinate and did not see the accident.

The plaintiff testified that when the train had proceeded to a point about 100 feet west of the Salt Lake crossing, a man known as Brown, a railway detective, descended the ladder on which plaintiff was hanging and killed him and as a result he fell under the train and sustained the injuries which resulted in the loss of his leg. He further testified that he had no warning of Brown's approach and did not see him before he was killed; that after the accident he was unconscious and remained so for a period of about two weeks. Goney testified that after plaintiff had alighted he again returned to the train and helped it and as it started to move slowly forward he saw a big tall man coming over the top of the cars from the opposite end and saw him go down the ladder upon which the plaintiff was hanging; that his next recollection was that he heard the plaintiff shouting and screaming he, Goney, "What is it?" toward the engine where he was caught by the car; that he then saw plaintiff hanging around on the leg between the tracks west of the belt crossing.

The defendant on its own behalf introduced testimony to

tracks and that the only way to get to the Hawthorne Race Track was over the bridge used by the Belt Railroad and that from the testimony of plaintiff's witnesses the accident happened 100 feet west of the Belt Railroad, indicating that the plaintiff had no intention of attending any event at that particular place.

Evidence was introduced showing blood stains at or near a small upright pot signal, and that the inference to be drawn from this fact was that the boy had been hit by this while on the car and knocked off. The train crew consisted of Mullin, conductor, Bach, fireman, Hamm, engineer, Eames and Webber, switchmen and Rafferty, a special agent. These witnesses, with the exception of Webber who was dead, testified that they did not see Burns anywhere near the Belt crossing that afternoon and that he was not a member of the crew.

Nission, a Captain of Police, testified for defendant that he saw Burns at the Glenn yard and that Burns was not out of that yard nor near the Belt Crossing on that day.

Rafferty, who was a special agent for the defendant company and with the crew on the day of the accident, testified that he was riding in the caboose and as it passed the post signal he saw two boys carrying another boy toward the shanty and saw that one of them had lost a leg; that he then alighted from the train and tied up the boy's leg and carried the boy into the shanty; that the boy was then taken to Brighton Park on a passenger train and from there to the Cook County Hospital in a police ambulance. Rafferty further testified that at the time he saw no person at the scene of the accident except the three boys, Blake, Cooney and Kropp, and the crew of the train.

Mahone, a witness on behalf of the defendant, testified that he was a physician connected with the Cook County Hospital in 1923 as an interne; that in 1926 he entered private practice and since

1930, he has been connected with the United States Veterans' Hospital at Tuskegee, Alabama; that on the day in question Blake was brought in and he took the history of the case; that the boy was conscious when he came into the hospital; that the plaintiff told him that he had been playing on the railroad tracks and accidentally fell under the wheels of a train.

January 3, 1924, Blake signed a statement which was witnessed by his sister, Mrs. J. D. Moulton, and which was obtained by the claim agent of the company. In that statement Blake stated that he and his two companions had started for Hawthorne to see a prize fight and stopped at a shanty near the Belt Crossing; that they were standing there and Cooney started to run west along the south side of the track and he, Blake, started after him; that he stumbled and fell and rolled under the side of a freight train and his left leg was run over; that he did not have a hold of the cars and was not attempting to get on it; that he was not pushed, kicked nor struck by any one of the crew.

September 10, 1923, Cooney gave a written statement and on November 28, 1923, he gave an additional statement to the agent of the defendant company. In these Cooney stated that they were on their way to Hawthorne and that when he got near the Belt Railroad Crossing they went into a shanty where a man by the name of Flynn worked to get a drink; that they saw a train coming and Blake said, "Let's have a game of 'It' until the train passes"; that he said "All right" and Blake started from the door went around to the left and around the east end of the shanty; that he ran along with the train and shouted, "You will never get me"; that he, Cooney, shouted for him to look out for the switch but he ran into it and was knocked into the train with both legs under the middle of the car, but that he pulled one of them out; that Cooney then shouted to one of the

1930, he had been connected with the United States Customs Service at Tashkent, Russia; that on the day in question Blake was working in and he took the history of the case; that the day was conspicuous when he came into the hospital; as a result of this he told him that he had been playing on the railroad tracks and accidentally fell under the wheels of a train.

January 3, 1934, Blake signed a statement which was witnessed by his sister, Mrs. J. H. Hamilton, and which was obtained by the chief agent of the company. In last statement Blake stated that he and his two companions had started for Westmoreland to see a prize fight and stopped at a shortly after the fight broke out; that they were standing there and O'Connor started to run away from the main side of the track and he, Blake, started after him; that he stumbled and fell and rolled under the side of a freight train and his left leg was run over; that he did not have a pain at the time and was not attempting to get up at; that he was not injured, kicked nor struck by any one of the crew.

September 12, 1935, O'Connor gave a written statement and on November 12, 1935, he gave an additional statement to the agent of the defendant company. In these O'Connor stated that they were on their way to the Westmoreland and that when he got near the left railroad crossing they went into a thicket where a man by the name of O'Brien worked to get a drink; that they saw a light coming and O'Brien said, "Let's have a look at it" until the train passed; that he said "all right" and O'Brien started from the back end of the train and around the east end of the crossing; that he ran along with the train and shouted, "You will never get me"; that he, O'Connor, started for him to get out for the train but he ran into it and was hurled into the train with feet down under the side of the car, but that he killed one of them out; that O'Connor then started to one of the

switchmen on the rear of the caboose that a boy had his leg cut off and that the train stopped and they flagged a passenger train and Blake was taken to Brighton Park.

Several statements were made but in none of them does it appear that any man by the name of Burns was in the vicinity of the accident, nor does any statement contain a charge that the plaintiff was kicked off of or from the train. This action was not started until nearly 10 years after its occurrence and not until shortly after Burns had died. Consequently, the testimony of Burns could not be procured. The testimony of the plaintiff, Blake, and Cooney were singularly at variance with the statements made by them prior to the trial. The trial court had an opportunity to see and hear the witnesses and the jury was evidently not convinced by the story of the alleged actions of Burns in kicking the plaintiff from the train. The plaintiff was a trespasser upon the right-of-way of the defendant company and it owed him the duty only of not wilfully injuring him.

We are not in accord with the position taken by counsel for plaintiff on this appeal, namely, that the verdict is contrary to the weight of the evidence. We are of the opinion also that there was evidence in the record which justified the court in instructing the jury on behalf of the defendant that it had a right to disregard the testimony of any witness if it believed that such witness had testified falsely to a matter material to the issue except in so far as such testimony might be corroborated by other evidence in the case; neither do we find that there was anything in the record showing that counsel for defendant was guilty of improper conduct.

But one question is raised by plaintiff which we consider worthy of consideration. The witness for the defendant, Mahone, the doctor in charge of the case when plaintiff arrived at the hospital,

testimony of the fact of the murder that a boy had his leg cut off
and that the train stopped and that it stopped in a passenger train and
Alaska was taken to the station house.

Several statements were made out in some of these cases in
cases and they are by the name of some of the victims of the
accident, not does any statement come in a way that the plaintiff
was blocked off of or from the train. This action was not started
until nearly 15 years after the accident and not until shortly after
there had been. Consequently, the testimony of these cases and be
proceed. The testimony of the plaintiff, his wife, and society were
singularly at variance with the statements made by them prior to
the trial. The trial court had no opportunity to see and hear the
witnesses and the jury was obviously not convinced by the story of
the alleged victims of the train in making the plaintiff free the train.
The plaintiff was a passenger on the night of the accident
company and it was in the fact that it was truthfully informing him.

It was not in evidence that the plaintiff knew or counsel
for plaintiff in this case, namely, that the victim is contrary to
the weight of the evidence. In fact of the victim also that there was
evidence in the record which showed that the victim was in fact
jury on behalf of the defendant and it was right to disregard the
testimony of the witness if it is believed that such witness had been
lied falsely in a way that is not in fact except in so far as
testimony might be corroborated by other witnesses in the case; neither
do we find that there was anything in the record showing that counsel
for defendant was guilty of intentional conduct.

But one question is raised by plaintiff which is whether
worthy of consideration. The answer for the defendant, namely, the
doctor in charge of the case when plaintiff arrived at the hospital.

testified from his recollection that the boy was conscious at the time he arrived and that he had made this statement already referred to, in regard to the manner in which the accident happened, while in a conscious condition. The hospital record was not offered or introduced in evidence by the defendant upon the presentation of its case.

In rebuttal plaintiff himself took the stand and testified that he had never seen nor talked with Mahone and further that he had never told Mahone he was hurt while playing on the right-of-way of the railroad company. Plaintiff also on rebuttal produced Mrs. Moulton, his sister, who testified that the plaintiff was unconscious at the time he entered the hospital and remained so for many days thereafter. The hospital record was then produced for the purpose of showing that the plaintiff was conscious and had talked to the witness Mahone. This was in sur-rebuttal and in refutation of the testimony offered by the plaintiff. Gates v. People, 14 Ill. 433; Stolo v. Blair, 68 Ill. 541; Waller v. People, 209 Ill. 284. The facts contained in the hospital record were already in evidence, and properly so. The fact that the record itself was permitted to go to the jury, under the circumstances in this case, would not render it such error as would require a reversal.

We see no reason for disturbing the judgment and for that reason the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

37311

LAURA H. AVANT, Administratrix of the
Estate of Earl Avant, Deceased,

(Plaintiff) Plaintiff in Error,

v.

MACON F. SANDERS and MARY SANDERS,

(Defendants) Defendants in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

277 I.A. 617¹

Opinion filed Oct. 23, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Laura H. Avant, as administratrix of the estate of Earl Avant, deceased, brought this action against Macon F. Sanders and Mary Sanders on a promissory note for the sum of \$3,290, payable to the order of Earl Avant and dated September 1, 1930.

On the trial of the cause defendants produced a witness by the name of Mabel L. Sanders who testified that she was a sister of Macon F. Sanders and a sister-in-law of Mary Sanders, the defendants in the case. Objection was made to her testifying on the ground that she was interested and that under the statute the action being one by an administratrix, she was, therefore, disqualified as a witness. Counsel for plaintiff asked leave to examine the witness on the voir dire for the purpose of showing her interest, but this was denied, and properly so. The cause was tried by the court without a jury and if it should have developed during the course of her testimony that she was disqualified, the court would have disregarded such testimony in arriving at its finding.

This witness produced a written document from which it appears that during the life time of Earl Avant and after the execution of the note upon which this suit was brought, she, Mabel Sanders, entered into a written agreement with Avant arising out of and by reason of an exchange of certain real estate and buildings located thereon. This agreement provided that upon the exchange of the

100-111

DAVID M. BELL, Administrator of the
Estate of Mary Sanders,

(Plaintiff) vs. (Defendant)

MADE BY MARY SANDERS

(Defendant) vs. (Plaintiff)

Opinion filed Oct. 23, 1934

MR. JUSTICE MASON delivered the opinion of the court.

DAVID M. BELL, Administrator of the Estate of Mary Sanders and

Respondent, vs. MARY SANDERS, Plaintiff, and

MARY SANDERS, Defendant, and

the order of David Bell and dated December 1, 1933.

On the trial of the cause the following evidence was introduced:

By the name of David M. Bell, Respondent, who testified that he was a sister

of Mary Sanders and a sister-in-law of Mary Sanders, the defendant

in the cause. Evidence was also introduced on the part of the

defendant that under the will of Mary Sanders the estate was being

administered, and was, therefore, entitled to a return.

Counsel for plaintiff asked leave to examine the witness on the

basis of the purpose of showing her interest, and this was denied.

The case was tried by the court sitting in jury

and it is shown that during the course of her testimony

that she was dissatisfied, the court would have intervened upon

her in arriving at the verdict.

This is a matter of record in the court from which it

appears that during the life time of Mary Sanders and after her death

of the estate upon which this will was made, and which was

entered into a written agreement with David Bell and by

reason of an error of certain real estate was collated located

thereon. This agreement provided that upon the death of the

properties Mabel Sanders was entitled to an equity for her property of \$5,000. As against this she was to assume the indebtedness of Macon and Mary Sanders to Avant as evidenced by the note in suit and this amount was credited by her on the \$5,000 equity, leaving a balance due her from Avant after all just credits and deductions of \$387.37. Upon the death of Avant she filed a claim for this latter amount in the Probate Court against his estate.

This witness testified that under this agreement, Avant was to have turned over to her the note of the defendants here, but failed to do so. She also testified that she received from Macon and Mary Sanders their note for \$3,436.04, in consideration of her taking up their obligation to Avant. This latter note was introduced in evidence on behalf of the defendants. This witness testified further that after this agreement was signed by herself and Avant she asked him for the note and he promised to bring it to her, but failed to do so.

Cornelius Woods, a witness on behalf of the defendants, testified that he was in the real estate business and had a conversation with Avant in the fall of 1931, in which Avant stated that Sanders did not owe him any money, but instead he, Avant, owed Sander's sister a small amount. This witness further stated that Avant said he and Sanders had straightened matters out and that certain papers had been drawn up by his lawyers. The document showing the agreement between Avant and Mabel Sanders dated November 14, 1931, already referred to, is evidently the instrument referred to by Avant, in his conversations with Woods.

Plaintiff claims that the witness Mabel Sanders was interested in the litigation and, therefore, was disqualified, by reason

of Chapter 51, Paragraph 2, Section 2, Cahill's Illinois Revised Statutes of 1933. This section provides:

"No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the *** administrator *** of any deceased person *** unless when called as a witness by such adverse party so suing or defending.***"

Mabel Sanders, in our opinion, had no such interest in the proceeding as would disqualify her as a witness. She was not a party to the suit; its results would not be binding as against her in any other proceeding. She had nothing to win or lose by reason of the outcome of the litigation.

The Supreme Court of this state in the case of Bellman v. Epstein, 279 Ill. 34, in its opinion defines this interest as follows;

"Section 1 of the statute in regard to evidence and depositions in civil cases removes the disqualification of a witness in any civil action by reason of his or her interest in the event thereof, but by section 2 the disqualification is retained as to any party to the action or person directly interested in the event thereof, where the adverse party sues or defends as administrator of any deceased person. Mayer was not a party to the suit, and when offered as a witness the question presented to the court was whether he was directly interested in the event of the suit. The true test of his interest was whether he would either gain or lose by the direct legal operation and effect of the judgment or that the record would be legal evidence for or against him in some other action. The interest which disqualifies a witness must be some legal, certain and immediate interest, however minute, either in the event of the cause itself or in the record as an instrument of evidence in a subsequent action to which he is a party against him or in support of his own claims."

Neither would the fact that the witness Mabel Sanders had a claim pending in the Probate Court against the estate of Avant disqualify her as a witness in this proceeding. This court in the case of Forster v. Sheridan Trust & Savings Bank, 257 Ill. App. 463, says:

of Chapter 31, Section 1, Illinois Revised
Statutes of 1913. This section reads:

"No party to any civil action, suit or proceeding,
or action or proceeding in the court of record,
shall be allowed to testify in his own behalf,
or in his own behalf, by virtue of the foregoing provision,
then any adverse party upon or before the court, or
before any justice of the peace, or before any
judge of any court, or before any justice of the peace,
or before any judge of any court, or before any justice of the peace."

Under section 1, in the above, and as herein amended in
the proceeding, it would naturally be a witness. It was not a
party to the suit; the result would not be binding on another party
in any other proceeding. The law was to win or lose by reason
of the outcome of the litigation.

The Supreme Court of this State in the case of Illinois
v. Egan, 275 Ill. 34, in the opinion written by Justice

follows:

"Section 1 of the statute in regard to evidence
and declarations in civil cases removes the disqualification
of a witness in any civil action by reason of his dis-
interest in the event thereof, but by section 1 the dis-
qualification is retained as to any party to the action or
person directly interested in the event thereof, where the
adverse party shall be an administrator of any
deceased person. Now, the party to the suit, and
when offered as a witness, the question presented to the
court was whether he was directly interested in the event
of the suit. The true test of his interest was whether
he would either gain or lose by the direct legal operation
of the judgment of the court in the event of his
testimony for or against him in any other action.
The interest which disqualifies a witness must be some
local, certain and immediate interest, however minute,
either in the event or the result of the trial or
an instrument of evidence is a competent action to which he
is a party or interested in the event of his own claim."

Nothing would be the fact that the witness would have had
a claim pending in the trial court against the estate of the
deceased party at the time of his death. This court in the
case of Illinois v. Egan, 275 Ill. 34, 1913, 1914.

"The mere fact that Cowing had a claim against the Walker estate *** did not render the latter incompetent to testify."

It is insisted that there is a discrepancy in the note sued on and the note mentioned in the written agreement. This discrepancy, however, is slight and there is no evidence of any other obligation. The written instrument in evidence, coupled with the relationship of the parties and the giving of an additional note by the defendants to Mabel Sanders to cover the note sued on, indicates clearly that the note upon which this action is predicated is the same as that mentioned in the agreement.

The court found in favor of the defendants and we believe properly so and in that regard the judgment of the Municipal Court should be affirmed. It appears from the record, however, that the judgment was against the plaintiff and that "the defendants have and recover of and from the plaintiff the costs by the defendants herein expended and that execution issue therefor." The judgment for costs should have been against the administratrix, as such, and payable in the regular course of administration. The judgment in this respect was erroneous.

The Supreme Court of this state in the case of McNulta v. Ensich, 134 Ill. 46, has laid down the rule as to the proper practice on appeal under such circumstances. The court in its opinion, says:

"We are of opinion that the judgment is erroneous in the respect urged. No judgment could be rendered against McNulta individually, and no award of execution could be made. It must be entered against him as receiver, and be made payable out of the funds held by him in that capacity, in the due course of administration of his receivership. Beach on Receivers, 715, and authorities cited.

This error will necessitate the reversal of the judgment of the circuit court, but as no error had intervened up to and including the overruling of the defendant's motion for a new trial, no occasion exists for awarding a venire facias de novo. In Alwood v. Mansfield, 33 Ill. 452, the court

found that the verdict of the jury was sustained by the evidence, but that an improper order had been entered thereon by the circuit court, and the proper entry of judgment was made in this court. (See, also, Pearsons v. Hamilton, 1 Scam. 415.) In the subsequent case of Storing v. Onley, 44 Ill. 123, the better practice is said to be, to reverse the judgment and remand the cause, with instructions to the circuit court to enter the proper order."

In the case at bar no error having intervened up to and including the overruling of the defendants' motion for a new trial, no occasion exists for awarding a venire facias de novo. The form of the judgment, however, being erroneous the judgment of the Municipal Court will be reversed and the cause remanded with directions to enter judgment in conformity with the foregoing ruling, together with the costs and in the manner hereinbefore defined.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND HALL, J. CONCUR.

found that the verdict of the jury was supported by the evidence, and that the defendant had been properly advised by the circuit court, and the proper entry of judgment was made in this court. (See, also, Winters v. Winters, 100 Cal. 113.) In the present case of Winters v. Winters, 100 Cal. 113, the court decided in said case, to reverse the judgment and award the costs, with instructions to the circuit court to enter the proper order.

In the case at bar no error having been shown on the trial, the reversal of the defendant's motion for a new trial, no occasion exists for granting a renewal of trial. The law of the present, however, being erroneous the judgment of the Municipal Court will be reversed and the case remanded with directions to enter judgment in conformity with the foregoing ruling, together with the costs and in the manner hereinbefore defined.

THOMAS G. WINTERS AND DAUGHTER
APPEALERS WITH DIRECTIONS.

WINTERS, G. L. AND DAUGHTER, J. J. WINTERS.

37321

JUNE O'CONNOR, a minor by ~~Mary~~
O'Connor, her Mother and Next friend,

(Plaintiff) Defendant in Error,

v.

CITY OF CHICAGO, a municipal corporation,
et al,

(Defendant) Plaintiffs in Error.

ERROR TO

CIRCUIT COURT

COOK COUNTY.

237 I.A. 617²

Opinion filed Oct. 23, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The plaintiff, June O'Connor, a minor, by her next friend, brought her action to recover damages for personal injuries sustained by reason of the joint and several negligence of the defendants, City of Chicago, Rocco Marr, Vito Antonio Marr and Mary Marr. The appearance of the defendant, City of Chicago, was filed in the cause and service had on the defendants, Vito Marr, Mary Marr and Rocco Marr. An order of default was entered as to the defendants, Vito Marr, Mary Marr and Rocco Marr and the cause proceeded to a trial before a jury, resulting in a verdict in favor of the plaintiff and ^(plural) against the/defendants. From this judgment the City of Chicago, alone prayed an appeal which was never perfected. The briefs and abstracts filed by the City of Chicago, however, are all entitled, "appellee" and "appellant".

In the brief filed on behalf of the City of Chicago, the following statement appears: "From which judgment defendant, City of Chicago, prosecutes this appeal". The record in this court shows that there is no appeal pending, but that the matter is here on a writ of error and, moreover, the record fails to show that the defendant, City of Chicago, asked for or obtained a severance in accordance with Rule 30 of this court. Plaintiff has not raised the question and it will be considered as waived.

The evidence shows that on June 24, 1931, plaintiff who was then of the age of thirteen years, was standing on the running

JOHN O'BRIEN, a alias by name,
O'Connor, her brother and sister,

(Plaintiff) Defendant in error,

v.

CITY OF CHICAGO, a municipal corporation,
et al.

(Defendant) Plaintiff in error.

25714.617

Opinion filed Oct. 23, 1934

MR. JUSTICE ALICE M. HALL, of the Court.

The Plaintiff, John O'Brien, a alias, by and next friend,

brought her action to recover damages for personal injuries sustained

by reason of the joint and several negligence of the defendants,

City of Chicago, George Marx, Vice President and City Clerk.

The appearance of the defendant, City of Chicago, was filed in the

cause and service had on the defendant, Vice President, City Clerk and

George Marx. An order is herein set forth as to the defendants,

Vice President, City Clerk and George Marx and the same proceeded to a trial

before a jury, resulting in a verdict in favor of the Plaintiff and

against the defendants. From this judgment the City of Chicago,

alone prayed an appeal which was duly perfected. The Plaintiff and

defendants filed by the City of Chicago, however, were all entitled,

"appealed" and "appealants".

In the brief filed on behalf of the City of Chicago, the

following statement appears: "From which judgment defendant, City

of Chicago, promissively this appeal." The record in this court shows

that there is no record pending, and that the matter is now on a

writ of error and, moreover, the record fails to show that the

defendant, City of Chicago, asked for an extension of time to file

an appeal with this court. Plaintiff has not asked

the question and it will be considered as waived.

The evidence shows that on June 12, 1931, Plaintiff and

board of an automobile which was parked on the north side of West Flournoy street, close to the curb and opposite the premises known as 2806 West Flournoy street.

The declaration charged that at the time of the accident Rocco Marr, Vito Antonio Marr and Mary Marr were possessed of and owned an automobile which was being driven at the time of the accident in an easterly direction on West Flournoy street by Rocco Marr, one of the defendants. It is also charged in the declaration that the car was operated in a careless and negligent manner and was caused to and did run against June O'Connor, the plaintiff, and as a result she sustained the injuries in question.

It is also charged in the declaration that alongside the car upon which June O'Connor was standing, the street was in a bad and unsafe condition and in a state of disrepair; that the car driven by Rocco Marr struck a depression in the street and was thrown out of control and caused to careen and swerve over and against the plaintiff; that this condition in the street had existed a sufficient length of time to create a presumption of knowledge by the city.

It is the contention of plaintiff that by reason of the joint and several negligences of the defendants, Rocco, Mary and Vito Marr in the management of the automobile and the negligence of the City of Chicago in permitting the street to become and remain out of repair, she received the injuries in question.

At the conclusion of the evidence the City of Chicago made a motion to direct a verdict to find the city not guilty. It is argued here that this motion should have been sustained because of the fact that the evidence did not support the verdict and also because the declaration did not state a cause of action. As to this latter contention we believe that after verdict the declaration was sufficient. It sufficiently apprised the City of Chicago of the fact

port of an automobile which was parked on the north side of East
 Lincoln Street, close to the curb and opposite the premises known
 as 2208 East Lincoln Street.

The investigation conducted at the time of the accident
 showed that the Lincoln Street car was owned by the defendant
 and was being driven at the time of the acci-
 dent in an easterly direction on East Lincoln Street. The car
 was of the defendant. It is also charged in the declaration that
 the car was operated in a careless and negligent manner and was
 caused to run and did run against the plaintiff, and as
 a result the plaintiff sustained injuries to his person.

It is also charged in the declaration that the plaintiff
 the day upon which the accident occurred, the street was in a
 bad and unsafe condition and in a state of disrepair; that the car
 driven by the defendant was struck in the street and was thrown
 out of control and caused to run and strike over and against the
 plaintiff; that this accident in the street had caused a sufficient
 length of time to create a deprivation of knowledge by the city.

It is the contention of the plaintiff that by reason of the
 joint and several negligent acts of the defendant, the plaintiff
 the City of Chicago in that they have failed to become and remain one
 of the City, and received the same in connection.

The declaration as now amended the City of Chicago
 made a motion to amend the declaration to read the City and State. It
 is argued here that this amendment would have been sustained because
 of the fact that the defendant did not support the verdict and also
 because the declaration did not state a cause of action. As to this
 latter contention we believe that the City of Chicago is entitled to
 sufficient. It is respectfully requested that the City of Chicago be

that its negligence as charged in the declaration was based upon the condition of the street. It may have been that a demurrer might have been sustained because of the fact that the allegations were general, but after verdict, we are of the opinion that they were sufficiently specific to apprise the city of the ground on which the negligence was predicated.

Several witnesses testified that a water main in the street had been repaired sometime in February in the year 1931, and in that month the street was dug up in order to make such repairs. After the repairs were made the dirt was thrown back into the excavation, but a depression remained which, according to the testimony of the witnesses for the plaintiff, varied in depth from 5 to 7 inches and extended into the middle of the street. It was 6 or 7 feet long and from 4 to 5 feet in width. One witness testified that after the dirt had settled and before the accident occurred, the excavation was possibly a foot in depth.

Eyewitnesses to the accident testified that Rocco Marr was driving east on this street and that his car hit the hole or depression and swerved into the car upon which the plaintiff was standing. In contradiction of this testimony the city produced two police officers who testified they visited this spot and could not see the depression. These questions of fact were for the consideration of the jury.

It is also insisted that the City of Chicago is not liable because of the fact that the injury was primarily due to the negligence of Rocco Marr in driving the car. The rule in this state has, however, been long established that if a person be injured by the combined result of an accident and the negligence of a city or village, and the injury would not have been sustained except for such negligence, yet, although the accident be the primary cause of

that its negligence as charged in the declaration was based upon the condition of the street. It may have been that a dangerous might have been maintained because of the fact that the allegations were general, but after verdict, as the court said, they were sufficiently specific to require the city of Chicago to show the negligence was neglected.

Several witnesses testified that a sewer main in the street had been repaired sometime in February in the year 1931, and in that month the street was dug up in order to make such repairs. After the repairs were made the dirt was thrown back into the excavation, but a depression remained, according to the testimony of the witnesses for the plaintiff, varied in depth from 3 to 7 inches and extended into the middle of the street. It was 6 or 7 feet long and from 4 to 5 feet in width. One witness testified that after the dirt had settled and before the accident occurred, the excavation was possibly a foot in depth.

Testimonies to the accident testified that when the car was driving east on this street and that his car hit the hole or depression and swerved into the curb upon which the plaintiff was standing. In contradiction of the testimony the city produced two police officers who testified they visited this spot and could not see the depression. These witnesses of fact were for the consideration of the jury.

It is also stated that the City of Chicago is not liable because of the fact that the injury was allegedly due to the negligence of the driver or to existing law. The law in this state has, however, been long established that if a person is injured by the criminal conduct of an accident and the negligence of a city or village, and the injury would not have been sustained without the such negligence, yet, although the accident be the primary cause of

the injury, if it was one which common prudence and sagacity could have foreseen and provided against, the negligent city or village will be liable for the injury.

While the negligence of the driver of the car may have been the primary cause of the injury, nevertheless, the depression in the street may have been the proximate cause. This question of proximate cause is one of fact for the jury. The jury was so instructed in one of the instructions given on behalf of the defendant, City of Chicago. Village of Carterville v. Cook, 129 Ill. 152; City of Rock Falls v. Wells, 169 Ill. 224. In the latter case the Supreme Court in its opinion, says:

"This court is not committed to the doctrine as laid down by the courts of some of the States, but has held, 'that if a plaintiff, while observing due care for his personal safety, was injured by the combined result of an accident and the negligence of a city or village, and without such negligence the injury would not have occurred, the city or village will be held liable, although the accident be the primary cause of the injury, if the consequences could, with common prudence and sagacity, have been seen and provided against' by such city or village. (City of Joliet v. Verley, 35 Ill. 58; Village of Carterville v. Cooke, 129 id. 152; City of Joliet v. Shufeldt, 144 id. 403; Weick v. Lander, 75 id. 93.) And has also held that the intervention of the negligent act of a third person over whom neither the plaintiff nor the defendant has any control, no more than an accident, breaks the casual connection of the negligence of the city with the injury. Village of Carterville v. Cooke, supra."

A case very similar as to the facts is found in Doerr v. City of Freeport, 239 Ill. App. 560. In that case a boy of the age of 12 years was sitting on the curb of a public street, facing a football, when an automobile going in a northerly direction struck a depression in the center of the street not far from where he was sitting and as a result skidded into him causing the injuries for which he sued. The judgment in his favor was sustained. The court in that case in its opinion, said:

will be liable for the injury.
have been and provided further, the defendant either will

[illegible][illegible]

in that case in the morning, said:

"In this connection it is also insisted that the negligence of the driver of the car and not the depression in the street was the proximate cause of the injury. This was a question of fact for the determination of the jury and by the tenth and fourteenth instructions given on behalf of appellant the jury were told that before the plaintiff could recover he must prove by the greater weight of the evidence that appellant was guilty of negligence as charged in the declaration and that its negligence was the cause of or contributed to the injury of appellee."

The injuries sustained by the plaintiff in the case at bar were serious. The medical testimony was to the effect that she had suffered a fracture of the pelvic bone and that as a result childbirth would become dangerous and by the normal routes would be inadvisable. The judgment is for \$5,000, which we do not deem excessive.

We see no reason for disturbing the judgment and for the reasons expressed in this opinion the judgment of the Circuit Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

"In this connection it is also stated that the negligence of the driver of the car was not the proximate cause of the injury. This the court was the province of the jury. This was a question of fact for the determination of the jury and by the tenth and fourteenth instructions given on behalf of appellant the jury was told that before the plaintiff could recover he must prove by the greater weight of the evidence that defendant was guilty of negligence as charged in the declaration and that the negligence was the cause of or contributed to the injury of appellee."

The injuries sustained by the plaintiff in the case at bar were serious. The medical testimony was to the effect that she had sustained a fracture of the pelvic bone and that as a result childbirth would become dangerous and by the normal process would be inadvisable. The judgment for \$5,000, which we do not deem

excessive. We see no reason for disturbing the judgment and for the reasons expressed in this opinion the judgment of the district court is, therefore, affirmed.

JUDGMENT AFFIRMED.

HEBELL, J. J. AND LAM, J. CONCUR.

37349

KATARZYNA DUMARA and D. J. SEELEY,
Joint Administrators of the Estate
of STANLEY DUMARA, Deceased,

(Plaintiffs) Appellees,

v.

THE WESTERN & SOUTHERN LIFE INSURANCE
COMPANY, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

277 I.A. 617³

Opinion filed Oct. 23, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiffs, as joint administrators of the estate of Stanley Dumara, brought this action on a policy of life insurance on the life of Stanley Dumara for the sum of \$500, the amount named in the policy. The cause was heard by the court without a jury, resulting in a finding in favor of the plaintiffs for \$500 and judgment on the finding.

Defendant in its brief states, "This is an appeal from the third trial based upon this policy."

This action was before this court on a prior appeal and a judgment in favor of the plaintiffs was reversed. That cause was entitled, Dumara v. The Western & Southern Life Insurance Company, 268 Ill. App. 626 (Not reported in full).

The policy in question is an industrial policy and was issued without a medical examination and contains the provision "No obligation is assumed by the company unless on the date of the policy the insured is in sound health."

Upon the previous appeal heard by this court it appeared from the record that the defendant had filed an affidavit of merits charging that Stanley Dumara was not in good health on the date the policy was issued and that the plaintiffs introduced no evidence showing the condition of his health at the time of the issuance of the

policy. We held in that case that the burden was upon the plaintiffs in the first instance to make proof of that condition of the policy and the judgment was reversed and the cause remanded for a new trial.

On the trial of the proceeding now pending before us, plaintiffs introduced testimony in the Municipal Court tending to show that the deceased was in good health at the time of the issuance of the policy. While the evidence is close, nevertheless, the trial court found in favor of the plaintiffs on this issue and entered judgment.

There must be an end to all litigation. As charged by defendant, this cause has been tried three times. This is the second proceeding which has been considered on appeal and in both cases a judgment by the court was found in favor of the plaintiffs.

The trial court had an opportunity of hearing and observing the witnesses and better situated to weigh their testimony.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

policy. It held in that case that the burden was upon the plaintiff in the first instance to make proof of that condition of the policy and the judgment was reversed and the case remanded for a new trial.

On the trial of the present case pending before us, plaintiff introduced testimony in the United States court tending to show that the deceased was in good health at the time of the issue of the policy. While the evidence is close, nevertheless, the trial court found in favor of the plaintiff on this issue and entered judgment.

There must be an end to all litigation. As charged by defendant, this case has been tried twice before. This is the second proceeding which has been considered on appeal and in both cases judgment by the court was found in favor of the plaintiff. The trial court had an opportunity of hearing and observing the witnesses and better situated to weigh their testimony.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEWITT, J. A. AND MARR, J. CONCUR.

37395

HARRY H. PACE,

Appellant,

v.

EULER DAVIS, etc., et al,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

277 T.A. 617⁴

Opinion filed Oct. 23, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an action for malicious prosecution brought by the plaintiff, Pace, to recover damages from the defendants, Davis and French. The cause was tried on the declaration and pleas of the general issue. At the close of plaintiff's case the court directed the jury to find a verdict in favor of the defendants and judgment was entered upon the verdict, from which this appeal has been taken.

We have not been aided in our consideration of the cause by briefs on behalf of the defendants.

From the evidence presented by plaintiff it appears that the defendants swore out two warrants for the arrest of the plaintiff in the Municipal Court of Chicago, charging him with having feloniously stolen and unlawfully converted to his own use certain certificates of stock of the Imperial Royalty, Royalty Corporation of America and Oklahoma Natural Gas Companies. Plaintiff was arrested and imprisoned pending the giving of a bond and upon a hearing in the Municipal Court was acquitted and discharged.

Plaintiff testified on direct that he had been in New York and arrived home June 16, 1931, and was met at the station by his wife and they proceeded to their home. Just before dinner two police officers appeared with a warrant and arrested him and he was taken to the police station at 48th street and Wabash avenue. He was placed in a cell where he stayed until 12 o'clock that night when he was

2722

WILLIAM F. BAKER

Appellant,

v.

JOHN DAVIS, et al., et al.,

Respondents.

WYOMING COUNTY.

1934

Opinion filed Oct. 23, 1934

THE COURT OF APPEALS OF THE STATE OF WYOMING.

This is an appeal from a judgment rendered by

the District Court, in and to which the parties

have been brought. The case was tried on the merits and the

verdict was in favor of the respondents.

The appellant claims that the verdict is against the law and

that the judgment is against the law and that the

same should be reversed.

It is not claimed in the briefs that the

verdict is against the law.

From the evidence presented by the parties it

appears that the appellant is a resident of the State of

Wyoming and that he is a resident of the County of

WYOMING and that he is a resident of the City of

WYOMING and that he is a resident of the Town of

WYOMING and that he is a resident of the Village of

WYOMING and that he is a resident of the Hamlet of

WYOMING and that he is a resident of the

WYOMING and that he is a resident of the

WYOMING and that he is a resident of the

WYOMING and that he is a resident of the

WYOMING and that he is a resident of the

WYOMING and that he is a resident of the

WYOMING and that he is a resident of the

released upon his own recognizance upon bond of \$10,000 in each of the two cases.

Testimony was introduced to the effect that the fact of his arrest had been published in several newspapers and received wide publicity.

Plaintiff testified that he had never seen the defendant, Euler Davis, who was prosecuting witness in the criminal action, until the morning of the trial at the police station; that he had had no business relations with her at any time with reference to any stock or the sale of any securities.

From a consideration of the testimony of this witness and his cross-examination, it appears that one Kirkpatrick had exchanged 540 shares of the Supreme Liberty Life Insurance Co. stock for certain stock owned by the defendant Davis. Kirkpatrick appears to have been employed by the Supreme Northeastern Company which had an office in the building of the Supreme Liberty Life Insurance Co. but Pace testified that Kirkpatrick had nothing to do with the corporation of which he, Pace, was president.

Plaintiff also testified that he signed the stock certificates in question in the regular course of business but did not receive the stock of the defendant Davis in exchange for it.

There is no testimony in the record as to the value of the stock of the Supreme Liberty Life Insurance Company nor of the stock turned over in exchange by the defendant Davis. There is no evidence of any fraud on the part of Kirkpatrick or anyone else in procuring the exchange. There is no direct testimony as to any connection between the plaintiff and Kirkpatrick, who appears to have engineered the exchange of the stock, other than as already stated.

released upon his own recognizance a sum of \$10,000 in cash

of the two cases.

Testimony was introduced as to effect upon the fact of

his arrest had been withheld in several newspapers and thereby

this publicity.

Plaintiff testified that he had never seen the defendant,

either before, and was prosecuting witness in the criminal action,

until the morning of the trial at the police station; that he had

had no business relations with him at any time with reference to

any stock at the sale of any defendant.

From a comparison of the testimony of both witnesses

and his cross-examination, it appears that the defendant had

exchanged the shares of the Eastern Liberty Life Insurance Co. stock

for certain stock owned by the defendant wife. This evidence

appears to have been supplied by the Eastern Liberty Life Insurance Company

which had an office in the vicinity of the Eastern Liberty Life

Insurance Co. but whose location and ownership had nothing to do

with the corporation at which he, then, was president.

Plaintiff also testified that he signed the stock certi-

ficates in connection with the receipt of shares of Eastern Liberty Life

Insurance Co. stock of the Eastern Liberty Life Insurance Co. stock

stock of the Eastern Liberty Life Insurance Company was of the

stock turned over in exchange for the defendant's share. There is

no evidence of any fraud on the part of the defendant or anyone else

in connection with the exchange. There is no direct testimony as to any

connection between the plaintiff and defendant, who appears to

have exchanged the shares of the stock, when they are jointly

attested.

The court should have required the defendants to put in their evidence and to have considered the cause upon all of the testimony. It was error to have directed a verdict on the evidence as we find it.

For the reasons stated in this opinion, the judgment of the Superior Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND HALL, J. CONCUR.

The court would not receive the statements as put in
their evidence and to have received the same then all the
the testimony. It was not to have been a receipt on the
evidence as we find it.
For the reasons stated in this opinion, the judgment of
the Superior Court is reversed and the cause is remanded for a
new trial.

REVEREND JUSTICE OF THE PEACE

WILLIAM J. HARRIS, J. CLERK.

37472

STEVEN C. SPENCER,

(Petitioner) Appellant,

v.

TRAVELERS INSURANCE COMPANY, a
corporation,

(Respondent) Appellee,

ANDREA MARTINEZ de YBARRA,

(Intervening Petitioner)

Appellee.

43
APPEAL FROM

17
SUPERIOR COURT

COOK COUNTY.

277 I.A. 618¹

Opinion filed Oct. 23, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Petitioner filed his petition in the Superior Court of Cook County seeking to enforce a claimed attorney's lien against a certain fund in the hands of the Travelers Insurance Company. This fund was represented by a policy of insurance taken out by one Thomas Ybarra in favor of Andrea Martinez de Ybarra, as beneficiary, the mother of the insured. The beneficiary intervened in the proceeding and filed her answer to the petition. Strenuous objection is made here to the right of the beneficiary to intervene, but the objection is untenable inasmuch as she had an interest in the fund. There is no point in the proposition that she did not file her appearance prior to filing her answer as this objection is obviated by an order of the trial court permitting her to intervene and file her answer.

The cause was tried upon the issues made up namely on the petition and the answers of the Travelers Insurance Company and the beneficiary, Andrea Martinez de Ybarra. The matter was referred to a master in chancery where evidence was taken and objections to the master's report overruled by the chancellor and the master's report approved. An order was entered by the court denying the petition and dismissing the same for want of equity at petitioner's cost, from which order this appeal has been perfected.

WILLIAM C. BROWN,

(Petitioner) Respondent,

v.

TRAVELERS INSURANCE COMPANY,
a corporation,

(Respondent) Appellee,

ANDREW MARTIN DE YARROW,

(Intervening Petitioner)

Appellee.

Opinion filed Oct. 23, 1934

MR. JUSTICE BRIDGES delivered the opinion of the court.

Petitioner filed his petition in the District Court of Cook County seeking to enforce a judgment allegedly rendered by a certain fund in the hands of the Travelers Insurance Company. This fund was represented by a policy of insurance taken out by one Thomas Yarrow in favor of Andrew Martin de Yarrow, as beneficiary, the member of the insured. The beneficiary intervened in the proceedings and filed his answer to the petition. Numerous objections are made here to the right of the beneficiary to intervene, but the objection is unavailing inasmuch as she has an interest in the fund. There is no point in the proposition that she did not file her appearance prior to filing her answer as this objection is waived by an order of the trial court permitting her to intervene and file her answer.

The cause was tried upon the issues made up mainly on the petition and the assets of the Travelers Insurance Company and the beneficiary, Andrew Martin de Yarrow. The matter was referred to a master in conformity with the rules and regulations in the master's report overruled by the court and the master's report was approved. An order was entered by the court denying the motion and dismissing the cause for want of equity at petitioner's cost, from which order this appeal has been perfected.

From the facts it appears that Thomas Ybarra during his lifetime was an employee of the Corn Products Refining Company and the policy in question was issued insuring his life in favor of the beneficiary on the 11th day of May, 1923, November 11, 1931, the policy was increased from \$1,000 to \$1,900. The policy was issued under a group life policy for the Corn Products Refining Company and among other things provided that if any employee of that company should furnish defendant with proof that while insured under the policy and having attained the age of 60 years, he became wholly disabled by bodily injuries or disease, and thereby prevented from engaging in any occupation or employment, the insurance company would waive further payment of premiums and pay in full settlement under the policy the amount of the insurance in force upon his life, in a fixed number of installments chosen by the employer.

In May 1932, the insured was ill of tuberculosis and in the tuberculosis hospital at Oak Forest, Illinois. On August 29, 1932, the company approved his claim for permanent total disability without objection and sent to the petitioner herein checks for August 29 and September 29 for installments of \$55.73 each. These checks were made out to Thomas Ybarra, who subsequently died November 10, 1932.

July 12, 1932, a copy of the attorney's lien notice was left at the office of the Travelers Insurance Company. By this notice it appears that the petitioner Spencer had been employed by Thomas Ybarra to represent him and prosecute his claim against the insurance company for money due him on account of a life insurance policy and that he was to receive a sum equal to one-third of any amount recovered thereon. No copy of the contract between Ybarra and Spencer accompanied said notice. Upon the trial of the cause Spencer testified that the written agreement between himself and

From the fact it appears that Thomas Ybarra during his
lifetime was an employee of the John Hancock Mutual Life Insurance Company and
the policy in question was issued during his life in favor of the
beneficiary on the 15th day of May, 1932. November 11, 1931, the
policy was increased from \$1,000 to \$1,500. The policy was issued
under a group life policy for the John Hancock Mutual Life Insurance Company
and among other things provided that if any employee of that company
should become disabled with respect to his ability to perform his
policy and having attained the age of 65 years, he should be
disabled by bodily injury or disease, and thereby prevented from
engaging in any occupation or employment, the insurance company
would give further payment of benefits and pay in full benefits
under the policy the amount of the insurance in force upon his life,
in a fixed number of installments chosen by the beneficiary.
In May 1932, the company paid all of the installments and in
the tuberculosis hospital at the University of Illinois. On August 23,
1932, the company approved his claim for permanent total disability
without objection and sent to the beneficiary certain checks for
August 23 and September 15 for total amounts of \$22.75 each. These
checks were cashed out at the bank, and subsequently cashed November
10, 1932.

July 1, 1932, a copy of the company's first notice was
left at the office of the receiver insurance company. It was
noticed it appears that the beneficiary's name had been employed by
Thomas Ybarra to represent him and promote his claim against the
insurance company for money due him on account of a life insurance
policy and that he was to receive a sum equal to one-third of any
amount recovered thereon. He kept at the contact between Thomas
and receiver associated with notice. Upon the trial of the cause
the court decided that the written agreement between himself and

Ybarra was lost, but that it provided as follows:

"I, Thomas Ybarra,, hereby employ Mr. Steven C. Spencer as my attorney to represent me in claims against the Travellers Insurance Company and the Corn Products Refining Company, a compensation matter, and to sell three (3) shares of stock of the Corn Products Refining Company; and I, Steven Spencer promise to perform all of these services for a one-third share of the face value of the Travellers Insurance Company policy."

It will be noted that the contract provided that the attorney should do three separate and distinct things:

First, represent Ybarra in his claim against the insurance company;

Second, represent Ybarra in his claim against the Corn Products Refining Company, a compensation matter; and

Third, sell three shares of stock of the Corn Products Refining Company, belonging to Ybarra.

Spencer testified that in June, 1932, he filed a petition for an adjustment of the compensation claim against the Corn Products Company for Ybarra before the Illinois Industrial Commission and it was stipulated that there were several hearings before that commission, but there is nothing in the record showing its final conclusion. The petitioner does not appear to have done anything with regard to the three shares of the stock which it was stipulated in the agreement he was to sell for Ybarra. Petitioner testified that he did not have possession of the shares of stock. No reason is given, however, as to why he did not have possession, although it is argued that he was prevented from performing because of the fact that the stock was never turned over to him. In his testimony petitioner stated that his claim was for a one-third interest in the policy, based on something more than merely settling with the insurance company. He also stated that the insurance company never refused to settle.

1. The first thing I noticed when I stepped out of the plane was the cold, crisp air. It was a relief after the warm, humid air of the tropics. I looked around and saw a vast, open landscape stretching out before me. The ground was a mix of brown and green, with some small trees and bushes scattered here and there. In the distance, I could see a range of mountains, their peaks shrouded in a light mist. The sky was a pale blue, with a few wispy clouds. I felt a sense of freedom and adventure, knowing that I was about to embark on a journey that would take me to the heart of the wilderness.

It will be noted that the above information is not a complete list of the information available to the FBI regarding the activities of the above named individuals.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

: 750000

[illegible]

TOOK THE FOLLOWING PHOTOGRAPH

fact, and it is to be expected that the first line, which

Journal of Management Education 30(1)

negative - self and other, and a self-referential process

[illegible]

In support of the order of the Superior Court dismissing the petition, the respondents take the position:

First, that the contract is indivisible and there is no evidence in the record showing performance by petitioner;

Second, that the contractual arrangements between Ybarra and petitioner, under which the petitioner undertook to collect compensation from the Corn Products Refining Company was illegal inasmuch as the statute providing for compensation provides that the board created under the Compensation Act should have the power to fix and determine the reasonableness and amount of any fee or compensation, including that of the fees of the attorneys; and

Third, that the policy which was in the hands of the petitioner at the time of the trial was not assignable inasmuch as it contained no provision authorizing the insured to change the beneficiary without the consent of the insurance company and that upon the death of Ybarra the proceeds of the policy were vested in the beneficiary.

As to the first of these contentions, namely, that the policy is not divisible, we are inclined to agree. No provision was made in the agreement as to the amount that should be appropriated for attorney's fees, but only stated each separate act that was to be performed thereunder.

The Supreme Court of this state in the case of Keeler v. Clifford, 165 Ill. 544, in its opinion, says:

"The question, whether a contract is entire or severable, cannot be determined by any precise rule, but must depend upon the intention of the parties, which in each case is ascertained from the language employed, and the subject-matter of the contract. 'If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. And the same rule holds, where the price to be paid is clearly and distinctly apportioned to different parts of what is to be performed, although the latter is in its nature single and entire.' (2 Parsons on Contracts, marg. p. 517). Wharton, in his work on the Law of Contracts, says (sec. 748): 'When a consideration is divisible, and the price can be apportioned, then, if a distinct and divisible portion of the consideration fails, the price paid for such portion can be recovered back.' (See, also, Bank of Antigo v. Union Trust Co. 149 Ill. 343."

In the case at bar it does not appear how the fees should be apportioned nor does it appear from the evidence that the petitioner had fully performed. Neither does it appear whether or not the board made any provision for compensation for services rendered in the proceeding before it. If provision had been made by such board, such fees would have to be deducted from any amount claimed from the Travelers Insurance Company.

As to the second proposition we do not feel called upon to pass upon the question as to whether or not such an agreement would be binding in the face of the statutory provision giving the board the right to fix the attorney's fees.

Third, the policy itself provided for payment in installments. We doubt whether petitioner could have enforced his claim against the insurance company in the event Thomas Ybarra had continued to live during the time that these installments were payable. In order to allow petitioner to collect, it would have been necessary to rewrite the policy and change the contract of the parties and to compel the insurance company to pay immediately a specific sum in cash. This the law would not do.

The policy provides that any installments remaining unpaid at the death of the employee shall be payable as they become due to the beneficiary as designated by such employee. The beneficiary in this case was the intervening petitioner, Andrea Martinez de Ybarra, and her interest became fixed on the death of the insured.

The master and the trial court found in favor of the respondents and for the reasons stated in this opinion we see no reason for disturbing the order of the court dismissing the petition. Therefore, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

to pass upon the question as to whether or not the Government would be bound in the case of the statutory provision giving the board the right to the the effect of the law.

10-11-41

fore, the judgment of the Superior Court is affirmed.

44
 UNDERGROUND CONSTRUCTION COMPANY,
 a Corporation duly organized and
 existing under and by virtue of
 the laws of the State of Illinois,
 Appellant,

vs.

THE SANITARY DISTRICT OF CHICAGO,
 a municipal corporation organized
 under the laws of the State of Illinois,
 Appellee.

7
 APPEAL FROM SUPERIOR
 COURT OF COOK COUNTY.

277 I.A. 618²

MR. PRESIDING JUSTICE O'CONNOR
 DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover \$64,466.15 claimed to be due it for damages on account of defendant's breach of a contract between the parties. There was a trial without a jury and a finding in plaintiff's favor for \$17,191.57; plaintiff and defendant each made a motion for a new trial but the motions were overruled, judgment was entered on the finding, and plaintiff appeals, claiming that it is entitled to the full amount of its claim. Defendant has filed cross errors, contending that plaintiff is not entitled to any damages.

The record discloses that on April 26, 1928, plaintiff and defendant entered into a written contract whereby plaintiff was to construct a bridge, superstructure and approaches over the Sanitary canal on South Crawford avenue in Chicago, the estimated cost of which was \$970,995.25. The contract provided for payment in monthly installments as the work progressed on certificates issued by defendant's engineer. Eighty-seven and one-half per cent of the amount was to be paid monthly and twelve and one-half percent retained until the work was completed. Plaintiff began the construction of the bridge and was paid monthly installments until December, 1928. Plaintiff continued with its work on the

[illegible]

10

1. The first of these is the fact that the
the first of these is the fact that the
the first of these is the fact that the

818 A 17.2

THE UNIVERSITY OF CHICAGO

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the results of its investigation into the activities of the British Communist Party in the United States.

[illegible]

bridge until January 23, 1929, when there was another installment due. At that time more than 70% of the work was completed. The December installment was \$19,952.50, and the January installment \$14,705.25, and on account of defendant's failure to pay these two installments plaintiff on January 23, 1929, suspended work. The failure of defendant to pay the installments was caused by the fact that it was enjoined by the court from selling its bonds. Afterward defendant obtained legislation authorizing it to issue and sell its bonds and the work was resumed November 21, 1929, at which time the parties entered into a supplemental agreement. The supplemental agreement extended the time within which the bridge was to be constructed. Thereafter plaintiff completed the work and was paid in full, including extras, the total amount being \$983,385.09.

Plaintiff's position is that on account of defendant's failure to pay the monthly installments as the work progressed (as provided for in the contract) it rightly suspended work for a period of about ten months until defendant was again in funds; that on account of such suspension plaintiff necessarily paid out large sums of money, and was otherwise damaged, and that shortly after the work was suspended defendant's engineer, who under the contract had the sole power of passing on the question of damages, agreed that plaintiff might suspend the work until the defendant was again in funds, and that any damage plaintiff suffered during the time of suspension would be paid by defendant. The court in deciding the case found as plaintiff contends, viz., that defendant's chief engineer agreed that plaintiff might suspend the work, that it would be paid all damages occasioned by such suspension, and that the engineer had authority under the contract to enter into such agreement. The court allowed certain items claimed by plaintiff, disallowed some, and reduced others.

Counsel for plaintiff say in the opening of their brief:

"There is no dispute in this case on the facts. The dispute is on the law applicable to the facts;" while counsel for defendant contend that the finding is against the manifest weight of the evidence.

We think defendant's contention must be sustained; that the overwhelming weight of the evidence is to the effect that defendant's chief engineer did not authorize or agree to the suspension and did not agree that defendant would pay plaintiff any damage it might sustain by reason of such suspension.

The only evidence in the record to sustain plaintiff's contention on this point is the testimony of its former counsel, and it is very doubtful if the testimony of this witness makes out a prima facie case for plaintiff on this question. He testified that about the middle of January, 1929, he was the attorney for plaintiff and went to see defendant's chief engineer; that he told the engineer the installments for December and January had not been paid and that he knew defendant had no money; that the engineer said defendant had no money because it could not sell its bonds on account of a suit; that it had been decided by the court that defendant's bonds could not be sold without a referendum vote, and that in his opinion funds would not be available without further legislation. He further testified that he again talked with the engineer on January 23, 1929, at which time the witness told him plaintiff had two alternatives - that it could rescind and cancel the contract and remove the equipment which was on the ground where the bridge was being constructed, and recover for the work that had been done, which course would probably be for the best interest of the plaintiff because at that time it had 70% of the work done, which was the most profitable part of the job; but that plaintiff was anxious to cooperate with defendant to keep the expense down; that the other alternative was to suspend work until defendant was in funds and then proceed and complete the work; that if this latter course were pursued the witness wanted the assurance that plaintiff

would be paid the actual damages it had sustained by reason of the suspension; that the engineer asked what the damages would be and the witness told him that there would be costs of maintaining watchmen and superintendence in watching the plant; the fair rental value of the machinery and equipment on the site; the damages, if any, to the material on the ground, and whatever it would cost to put the work in shape on account of such suspension; that plaintiff would be entitled to interest on account of the 12½% retained by defendant under the contract until the work was completed; that the engineer then said that he did not think the money would be available until the first of July unless emergency legislation was obtained; that he wished counsel would put his proposition in writing; that he did not want to pass on something that was not in writing; and it was agreed that counsel would send a letter to the engineer; that on February 9th following such a letter was sent and on February 13th counsel and plaintiff's president again went to see the engineer; that the engineer produced the letter and said, "I have looked over what you claim for damages here and you will be entitled in my judgment, if you suspend work, to recover those damages." Thereupon counsel stated to the engineer that the contract was so worded that in counsel's opinion no one but the engineer had anything to do with plaintiff's damages; that at that time counsel said to the engineer it would cost defendant about \$100,000 to reinstall the equipment if plaintiff should remove it; that the engineer then stated that it was his judgment that in case the plaintiff abandoned the contract defendant could not let another contract for the same price as that mentioned in the contract between the parties; and the engineer stated that for that reason he did not want plaintiff to cancel the contract but to suspend the work; that thereupon counsel stated to plaintiff's president that under these conditions he would advise plaintiff to suspend the work and that he told the engineer

would be with the social sciences is not mentioned by reason of
the arrangement; that the committee asked that the sciences would be
and the witness told him that there would be a great deal of discussion
watchmen and superintendents in relation to the fact; the fact
twisted wires of the machinery and a witness on the fact; the fact
ones, it may be that the fact on the ground, and however it would
cost to put the work in charge on account of the discussion; and
slightly would be entitled to interest on account of the fact
retained by defendant under the contract until the fact was con-
fessed; that the engineer then said that he did not think the
money would be available until the fact of fact was emergency
legislation was obtained; that he wished to know what the fact
proposition in relation to the fact; that he did not want to pass on something
that was not in writing; and it was agreed that a contract would
send a letter to the engineer; that on February 28, 1901, such
a letter was sent and on February 28, 1901, the contract was obtained
present again sent to the engineer; that the engineer pro-
duced the letter and said, "I have looked over what you claim and
damages here and you will be entitled to my judgment, if you want
and wish, to recover these damages." There on a contract dated to
the engineer that the contract was a contract that in equity
opinion no one but the engineer had authority to do this kind of
this kind of thing; that at that time contract was to the engineer
it would have defendant about 1900, and to reimburse the engineer
it is difficult to say 10; that the engineer then stated that
it was his judgment that in case the plaintiff recovered the con-
tract defendant could not get another contract for the same price
as that mentioned in the contract between the parties; and the en-
gineer stated that for some reason he did not want plaintiff to
cancel the contract but to recover the work; that defendant cannot
cancel the contract's statement that under contract conditions he would
advise plaintiff to recover the work and that he said the engineer

plaintiff would give defendant from day to day plaintiff's costs in maintaining the plant during the suspension, which plaintiff would make as light as possible, and the engineer stated that would be satisfactory. The witness further testified that July 19, 1929, plaintiff wrote another letter to the defendant setting up in detail the amount of the expenses incurred by it on account of the suspension. This letter and the letter of February 9th will hereinafter be discussed. The witness further testified that no other notice was given to the defendant.

There was a former trial of the case in which plaintiff had a verdict, and thereupon both parties made a motion for a new trial, which was awarded. Defendant's engineer testified on that trial, and by agreement his testimony was read into the record, which is before us. He testified that he had been defendant's chief engineer for a number of years and was such at the time he was testifying; that plaintiff suspended the work on the contract January 23, 1929; that at that time he was visited by plaintiff's counsel and its president; that there was a good deal of talk about the suspension of the work. "I had nothing to do with the suspension of the work;" that plaintiff's counsel, in his presence, said they were contemplating suspending the work because plaintiff was not getting its money; that the work was about 70% done; that he told them defendant had no money because of the inability to sell its bonds; that "I told them I thought they were entitled to consideration. The fact that they had bid on this job in good faith and the fact that they were not doing any other work gave them a right to some consideration, and that if I were the sole arbitrator, such as was interpreted in the contract, I would recommend to the Board they be given consideration for any loss that occurred on the job;" that thereupon counsel wanted the witness to write a letter substantiating what was there said, but the witness refused to do so; that he received the letter of February 9th above mentioned, and a few

[illegible][illegible]

days thereafter had another conversation, which was substantially the same as the first conversation above mentioned. He further testified: "I said the law department did not interpret the contract the same way as I did, and I was not going to write any letters which would afterwards be construed as an order from me to shut down the work; *** I told them for that reason, to take their own chances on the shutting down of the work.*** that I would recommend that they be paid for any losses that occurred out there on that work, and that I thought they were entitled to consideration."

February 9, 1929, plaintiff wrote a letter to defendant's engineer which is above referred to. In that letter defendant says that 73% of the work has been completed under the contract and that there is a provision in the contract that the chief engineer should determine all questions in relation to the work, decide all questions relative to the execution of the work, and that his decision is final and conclusive on both parties; that under the contract defendant agreed to pay monthly installments as the work progressed upon certificates signed by the engineer after withholding 12½% as a reserve until the work was done; that there was due the December installment of \$18,952.50, and also due for January another installment, and payments not having been made, defendant was in default for December and January; that on account of such defaults plaintiff "will suspend all work on this contract until it is paid;" that there might be no misunderstanding and that defendant might not be compelled to cancel the contract and remove its machinery and equipment from the site and sue for damages for "loss of profits *** we make the following proposition, to remain in force until the first day of August, 1929, and as much longer as shall be hereafter mutually agreed upon."

First: That all work except that absolutely necessary to protect material on hand be suspended until defendant makes payment of the December and January installments.

[illegible][illegible][illegible]

of the Department and Laboratory Investigations.

Second: That the time of completion of the contract shall be extended for a period equivalent to the time lost by reason of such suspension.

Third: That until these two installments are paid defendant shall pay plaintiff "for any necessary watchman at the site of such bridge, extra premiums on the contract bond, *** the fair market rental value of the equipment now installed on said site necessary for the completion" of the work, and that the suspension should not extend beyond August 1, 1929, without the mutual consent of the parties.

"If the above meets with your approval, please accept the same so that the above proposition may be binding."

July 19, 1929, plaintiff wrote another letter to defendant for the attention of its engineer. This is the letter heretofore mentioned. In that letter the plaintiff says that in accordance with its understanding with the engineer's chief assistant and its counsel, plaintiff is enclosing a statement of its claimed damages growing out of the Crawford avenue bridge contract by reason of defendant not paying the monthly installments. Enclosed are a number of schedules itemizing plaintiff's claim, one of which is for cost incurred by plaintiff for "superintendence, labor and watchman in protecting the plant and material" to July 1st, and saying that it was understood that if plaintiff again started to complete the job it would continue the computation from July 1st. Other items claimed are for "rental of the equipment" on the site during this period; "interest on the cost of the railroad tracks," etc., figured at 6% for the period that the work was suspended; "anticipated damages" which cannot be ascertained until the work is completed, itemized as follows: Cleaning steel; reconstructing of concrete forms injured by the elements; necessary premiums on the bond of the contractor; increase in scale of wages; and other expenses for extra work caused by delay. The letter

...and the ...

and small, very beautiful, "low key" decorative patterns in the walls of the room. The walls are painted a light cream color, and the floor is covered with a light-colored, patterned carpet. The room is very bright and airy, with large windows on the right side. The windows are framed with white woodwork, and the view outside is of a green lawn and trees. The room is very clean and well-maintained, and the furniture is simple and functional. The room is a very pleasant surprise, and it is a great place to stay.

of the device.

[illegible]

1. The first of these is the fact that the
 2.
 3.
 4.
 5.
 6.
 7.
 8.
 9.
 10.
 11.
 12.
 13.
 14.
 15.
 16.
 17.
 18.
 19.
 20.
 21.
 22.
 23.
 24.
 25.
 26.
 27.
 28.
 29.
 30.
 31.
 32.
 33.
 34.
 35.
 36.
 37.
 38.
 39.
 40.
 41.
 42.
 43.
 44.
 45.
 46.
 47.
 48.
 49.
 50.
 51.
 52.
 53.
 54.
 55.
 56.
 57.
 58.
 59.
 60.
 61.
 62.
 63.
 64.
 65.
 66.
 67.
 68.
 69.
 70.
 71.
 72.
 73.
 74.
 75.
 76.
 77.
 78.
 79.
 80.
 81.
 82.
 83.
 84.
 85.
 86.
 87.
 88.
 89.
 90.
 91.
 92.
 93.
 94.
 95.
 96.
 97.
 98.
 99.
 100.
 101.
 102.
 103.
 104.
 105.
 106.
 107.
 108.
 109.
 110.
 111.
 112.
 113.
 114.
 115.
 116.
 117.
 118.
 119.
 120.
 121.
 122.
 123.
 124.
 125.
 126.
 127.
 128.
 129.
 130.
 131.
 132.
 133.
 134.
 135.
 136.
 137.
 138.
 139.
 140.
 141.
 142.
 143.
 144.
 145.
 146.
 147.
 148.
 149.
 150.
 151.
 152.
 153.
 154.
 155.
 156.
 157.
 158.
 159.
 160.
 161.
 162.
 163.
 164.
 165.
 166.
 167.
 168.
 169.
 170.
 171.
 172.
 173.
 174.
 175.
 176.
 177.
 178.
 179.
 180.
 181.
 182.
 183.
 184.
 185.
 186.
 187.
 188.
 189.
 190.
 191.
 192.
 193.
 194.
 195.
 196.
 197.
 198.
 199.
 200.
 201.
 202.
 203.
 204.
 205.
 206.
 207.
 208.
 209.
 210.
 211.
 212.
 213.
 214.
 215.
 216.
 217.
 218.
 219.
 220.
 221.
 222.
 223.
 224.
 225.
 226.
 227.
 228.
 229.
 230.
 231.
 232.
 233.
 234.
 235.
 236.
 237.
 238.
 239.
 240.
 241.
 242.
 243.
 244.
 245.
 246.
 247.
 248.
 249.
 250.
 251.
 252.
 253.
 254.
 255.
 256.
 257.
 258.
 259.
 260.
 261.
 262.
 263.
 264.
 265.
 266.
 267.
 268.
 269.
 270.
 271.
 272.
 273.
 274.
 275.
 276.
 277.
 278.
 279.
 280.
 281.
 282.
 283.
 284.
 285.
 286.
 287.
 288.
 289.
 290.
 291.
 292.
 293.
 294.
 295.
 296.
 297.
 298.
 299.
 300.
 301.
 302.
 303.
 304.
 305.
 306.
 307.
 308.
 309.
 310.
 311.
 312.
 313.
 314.
 315.
 316.
 317.
 318.
 319.
 320.
 321.
 322.
 323.
 324.
 325.
 326.
 327.
 328.
 329.
 330.
 331.
 332.
 333.
 334.
 335.
 336.
 337.
 338.
 339.
 340.
 341.
 342.
 343.
 344.
 345.
 346.
 347.
 348.
 349.
 350.
 351.
 352.
 353.
 354.
 355.
 356.
 357.
 358.
 359.
 360.
 361.
 362.
 363.
 364.
 365.
 366.
 367.
 368.
 369.
 370.
 371.
 372.
 373.
 374.
 375.
 376.
 377.
 378.
 379.
 380.
 381.
 382.
 383.
 384.
 385.
 386.
 387.
 388.
 389.
 390.
 391.
 392.
 393.
 394.
 395.
 396.
 397.
 398.
 399.
 400.
 401.
 402.
 403.
 404.
 405.
 406.
 407.
 408.
 409.
 410.
 411.
 412.
 413.
 414.
 415.
 416.
 417.
 418.
 419.
 420.
 421.
 422.
 423.
 424.
 425.
 426.
 427.
 428.
 429.
 430.
 431.
 432.
 433.
 434.
 435.
 436.
 437.
 438.
 439.
 440.
 441.
 442.
 443.
 444.
 445.
 446.
 447.
 448.
 449.
 450.
 451.
 452.
 453.
 454.
 455.
 456.
 457.
 458.
 459.
 460.
 461.
 462.
 463.
 464.
 465.
 466.
 467.
 468.
 469.
 470.
 471.
 472.
 473.
 474.
 475.
 476.
 477.
 478.
 479.
 480.
 481.
 482.
 483.
 484.
 485.
 486.
 487.
 488.
 489.
 490.
 491.
 492.
 493.
 494.
 495.
 496.
 497.
 498.
 499.
 500.
 501.
 502.
 503.
 504.
 505.
 506.
 507.
 508.
 509.
 510.
 511.
 512.
 513.
 514.
 515.
 516.
 517.
 518.
 519.
 520.
 521.
 522.
 523.
 524.
 525.
 526.
 527.
 528.
 529.
 530.
 531.
 532.
 533.
 534.
 535.
 536.
 537.
 538.
 539.
 540.
 541.
 542.
 543.
 544.
 545.
 546.
 547.
 548.
 549.
 550.
 551.
 552.
 553.
 554.
 555.
 556.
 557.
 558.
 559.
 560.
 561.
 562.
 563.
 564.
 565.
 566.
 567.
 568.
 569.
 570.
 571.
 572.
 573.
 574.
 575.
 576.
 577.
 578.
 579.
 580.
 581.
 582.
 583.
 584.
 585.
 586.
 587.
 588.
 589.
 590.
 591.
 592.
 593.
 594.
 595.
 596.
 597.
 598.
 599.

[illegible]

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the relationships between these factors. Once the causes of the problem have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the final step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation.

[illegible]

and that because the other work cannot be done, the latter

exists in the form of an independent; however, in some of these

institutions it is with them in the same way; however,

continued and said that plaintiff was informed the money was now available to proceed with the work and that "we suggest that these matters be ironed out, if possible, at once so that as soon as the Board should take action, if it does, the work will proceed without delay;" that it would be necessary for plaintiff to have an extension of time within which to complete the work; and the letter closes with the statement that plaintiff suggests if there was anything in the schedules accompanying the letter itemizing plaintiff's claim which was not clear, that a conference be held to clarify, "so that the entire matter can be taken up with the Board at the next meeting."

There is also in the record the supplemental contract entered into between the parties November 21, 1929. It recites the making of the contract between the parties which provides that the work be completed before October 1, 1929; that the contract provided that certain payments be made by the contractor (plaintiff) as liquidated damages in case the work was not completed in accordance with the contract; that after the execution of the contract plaintiff proceeded to construct the bridge, and about 70% of the work was completed by February 1, 1929, on which date the "Contractor by reason of the non-payment to him of monthly installments as the work progressed, upon certificates signed by the engineer suspended work and refused to go on until said payments were made," and that the work was still suspended; that plaintiff refused to go on and complete the work; that from the time of the suspension defendant was without funds for the completion of the work until July, 1929, and until that time the defendant did not know that the funds would be forthcoming and that they would not be available until about the first of October; that during the period the work was shut down plaintiff and his attorney had interviews with defendant's engineer and attorney and threatened to rescind the contract, "and were advised by these persons and

continued to hold that it was not the money but the
availability of the bank and that "we suggest that these
matters be looked only, at possible, at some of that in the
light of a full case record, it is clear, the work will proceed without
delay;" that it would be necessary for the bank to have an exam-

ination of the records which is essential for work; and the latter
clearly also the statement that the bank is not a party to
thing in the transaction concerning the latter statement; the bank's
claim which was not at all, that a conference be held in clarity, and
that the latter matter can be taken up with the bank at the next
meeting."

There is also in the report the suggestion that the matter
into between the parties November 11, 1934. It reads the version of
the contract between the two is a which provides that the work be com-
pleted before October 1, 1935; that the contract provided that the

work payable be made by the contractor (plaintiff) as follows:
damages in case the work was not completed in accordance with the

contract; that after the expiration of the contract the plaintiff intended
to contract the bridge, and about 70% of the work was completed by

February 1, 1935, on which date the "Contractor" by reason of the non-
payment to him of monthly installments was not able to proceed, and

certificates issued by the engineer suspended work and refused to do
on until such payments were made, and that the work was still com-

pleted; that plaintiff refused to do so and completed the work; that
from the time of the suspension of work without fault for the
completion of the work until July, 1935, and until that time the

contract did not exist and the work could be terminated and that
they would not be available until after the time of contract; that

during the period the work was not done plaintiff and his attorney
had interviews with defendant's engineer and attorney and discussed

to resolve the contract, and were advised by these persons that

various of the Trustees and the said Attorney and Engineer that in their judgment if it did not rescind the contract, the money for payment under the contract would eventually be forthcoming, and were advised by the Attorney that from a superficial reading of the contract the Attorney was then of the opinion that Section 32 of the said contract referring to 'unavoidable delay' included the circumstances that had arisen;" that during the period of suspension it was necessary for plaintiff to keep certain "watchmen and guards" at the site of the work to prevent loss of tools and appliances; that during the period of suspension no use was made of such tools, plants and equipment belonging to plaintiff; that before the work could be resumed certain additional work would be required of plaintiff; that by reason of the suspension the work could not be completed prior to the working season of 1930; that the plaintiff claimed that if it rescinded the contract and refused to go on, it could recover for the work already performed at the contract price, and that it would cost a new contractor in excess of \$100,000 beyond the balance of the contract price to complete the work; therefore the rescission of the contract by plaintiff would cause great loss and damage to defendant and the taxpayers; that plaintiff desired to complete the work to obviate such increased costs, ^{but} nevertheless the said contractor refuses to go on and complete the work unless there is at this time a settlement, compromise and adjustment of some of the differences between the contractor and The Sanitary District, and the right be given to the said contractor to bring such action in the premises as it may desire for any balance it claims to be due it after the said contract is completed without prejudice, because of completion of the said contract." The supplemental contract further recited that the defendant claimed plaintiff was entitled to no damages merely by reason of the delay in payment of the monthly installments; that such failure to pay did not, as a matter of law, prevent the contractor from going on with

various of the interests and the other and subject that in
 their judgment it is not feasible to proceed, the court for
 payment which the contract would eventually be made, and
 were advised by the attorney that it was a substantial violation of the
 contract and thereby the law of the state and nation to be
 the said contract relating to "Investment in the" included the
 circumstances that had arisen; that during the period of contract-
 also it was necessary for plaintiff to keep certain "records" and
 "books" at the side of the work to provide for the same and to
 assess; that during the period of contract the work was done at the
 side, of the work and equipment belonging to plaintiff; that before the
 work could be resumed certain additional work would be required of
 plaintiff; that by reason of the suspension the work could not be
 resumed until the morning of the 15th of 1930; that the plaintiff
 claimed that it is beyond the contract, and returned to the work,
 would however for the work already performed at the contract time,
 and that it would meet a new contract in terms of the work done
 the balance of the contract after it came to the work; that the
 the violation of the contract of plaintiff which would have been done
 and done to defendant and his employees; that plaintiff failed to
 observe the "rule" of the contract, and "investments" and
 the said contract returns to the work and complete the work which
 there is at this time a contract, contract and adjustment of
 part of the contract between the contractor and the plaintiff
 distinct, and the claim is made in the said contract to be done
 and action in the contract as it was done for the balance of
 claim to be made it was the said contract is completed without
 protest, because of violation of the said contract, the said
 plaintiff cannot claim that the contract was violated and claim
 that was violated as no damages result by reason of the delay in
 payment of the plaintiff's investments; that such claim to pay the

his work, and that no money was due plaintiff beyond the contract price; that from October 1st liquidated damages were accruing against defendant at the rate of \$100 a day; that it was to the interest of all persons to have the bridge completed without delay caused by any disputes or controversies or suits between the parties; and the contract further provided that the parties agreed plaintiff should have an extension of time for the completion of the work from and after October 1st of the number of days that the work was suspended from the date of such suspension to the resumption of the work, and that the resumption of the work by the plaintiff should not prejudice its rights as to any claims it might have against defendant.

The parties also entered into a stipulation of facts which, so far as it is necessary to state them here, are that plaintiff completed the work and was paid the contract price in full; that in April, 1929, plaintiff brought suit against defendant for the December and January installments, had judgment for the amount of its claim which has since been paid in full, with interest; that the only funds available for paying for the bridge were such as may be obtained from the sale of defendant's bonds; that in November, 1928,, defendant made provision for the issuance of \$27,000,000 of its bonds; that on January 15, 1929, a bill for injunction was filed to restrain the sale and delivery of the bonds, which injunction was awarded and the bonds destroyed; that the injunction was issued because the bonds could not be issued without a referendum vote; that thereupon defendant prepared a bill which was submitted to the legislature and which was passed, authorizing the issuance by defendant of 27 million bonds without referendum vote, which act took effect July 1, 1929. Thereafter defendant's Board of Trustees formally took steps to have the bonds properly issued and sold; that immediately upon receipt of the funds from the sale of the bonds, defendant

his wife, and that he never was and probably never will be
 again; that from October 1st 1934 to the date of the
 defendant's death at the age of 100 years; that it was in the
 interest of all persons to have the funds invested without delay
 caused by any increase in expenditures or waste between the par-
 ties; and the contract further provided that the parties agreed
 plaintiff should have an extension of time for the completion of
 the work from the date of the death of the husband to the date
 work was completed from the date of such completion in the trans-
 fer of the work, and that the completion of the work by the plain-
 tiff should not prejudice the rights of the defendant to have
 against defendant.

The parties also agreed that a stipulation of facts should

be that it is necessary in order to make the contract valid; that in
 consideration of the fact that the contract was in fact; that in
 April, 1937, plaintiff brought suit against defendant for the reason
 that and January 1937, defendant had agreed to pay the amount of the
 claim which has since been paid in full, with interest; that the
 only funds available for paying the claim were and are now
 obtained from the sale of defendant's bonds; that in November, 1937,
 defendant made provision for the issuance of \$25,000,000 of the
 bonds; that on January 15, 1938, a bill for injunction was filed to
 restrain the sale and delivery of the bonds, which injunction was
 awarded and the bonds destroyed; that the injunction was issued be-
 cause the bonds could not be issued without a referendum vote; that
 defendant's agreement provided a bill which was submitted to the legis-
 lature and which was passed, authorizing the issuance of defendant's
 of 17 million bonds without referendum vote, which act was signed
 July 1, 1938. Defendant's bill of 17 million bonds
 took steps to have the bonds properly issued and sold; that defendant
 fully upon receipt of the funds from the sale of the bonds, defendant

entered into negotiations with plaintiff, "who had suspended work because of a failure to receive payments for its monthly certificates for work performed;" that the supplemental agreement was entered into and the work finished by plaintiff and paid for. It was further stipulated that defendant denied any liability for any claims made against it by plaintiff growing out of the contract. The reasonableness of the expenses claimed by plaintiff, and the several items of its claims were admitted, but, as stated, liability was denied.

From the foregoing facts, which we have set forth with considerable detail, we are clearly of the opinion that the finding of the trial Judge that defendant's engineer had agreed with plaintiff to suspend the work until the Sanitary District was in funds, and that defendant would pay all damages plaintiff sustained by reason of such suspension, is against the manifest weight of the evidence. If the agreement had been made as contended for by plaintiff, it seems strange that no mention was made of this in the two letters, the supplemental contract or the stipulation of facts. The most that can be said of the testimony given by the former attorney for the plaintiff (which we have above detailed) is an inference that the engineer had agreed to the suspension and payment of damages. On the other hand, the engineer testified he had nothing to do with the suspension of the work; that plaintiff took its chances in the shutting down of the work; that he thought plaintiff was entitled to consideration on account of the suspension of the work, under the circumstances, and that he would recommend it be paid for any losses occasioned by this suspension. From this testimony it is clear that he put the burden on plaintiff of suspending or not suspending the work, and that he thought it would be entitled to consideration for damages sustained in case the work was suspended, and that he would recommend the payment of such

entered into negotiations with plaintiff, "and the defendant was
because of a failure to receive payment for the work done by plaintiff
after for some period;" "and the defendant was
entered into and the work done by plaintiff and paid for. It
the former stipulated that defendant should pay plaintiff for any
claims made against it by plaintiff growing out of the contract.
The reasonableness of the amount claimed by plaintiff, in the
several items of the claim was admitted, and, on account, the
claim was denied.

From the foregoing facts, which we have set forth with
considerable detail, we are clearly of the opinion that the plaintiff
of the trial judge's testimony is correct and that the plaintiff
will to support the work done by plaintiff is in fact,
and that defendant would pay all expenses plaintiff incurred by
reason of such work, is correct. The plaintiff's claim of \$100
therefore, is the amount he was due as defendant for the
plaintiff, it seems strange that the defendant was made of this in the
two letters, the defendant's refusal to pay the plaintiff of these
the most that can be said of the testimony given by the former and
plaintiff for the plaintiff (which we have seen earlier) is in the
language that the engineer was asked to be suspended and payment
of wages, on the other hand, the engineer testified that
nothing to do with the suspension of the work; that plaintiff was
the witness in the meeting held at the work; that he thought
plaintiff was entitled to compensation on account of the suspension
of the work, under the circumstances, and that he would have
been if he had for any reason connected with this suspension. From
this testimony it is clear that the defendant is entitled to
suspension or not suspending the work, and that the plaintiff is
be entitled to compensation for wages earned in connection with
the suspension, and that the defendant is obligated to pay

damages to the Board of Trustees of the Sanitary District. The engineer's testimony is corroborated by the two letters written by plaintiff on February 9th and July 19th above referred to. In this connection it must be remembered that the parties had a conference January 23rd, before the letter of February 9th was written, in which the former attorney for plaintiff says it was substantially agreed that the work might be suspended and the damages incurred paid by defendant. Yet in the letter of February 9th there is no intimation that such had been the understanding. On the contrary in the letter plaintiff stated that on account of the default of defendant in the December and January installments it will suspend the work until it was paid. It then goes on to make a proposition to defendant that the work be suspended until the installments are paid; that the time for the completion of the contract be extended, and that during the period of extension defendant shall pay plaintiff for any necessary watchmen employed at the bridge, for extra premiums plaintiff was required to pay on his contract bond, and the rental value of its equipment. This letter concludes that if the proposition meets with approval, defendant will accept the same. This is merely a proposition coming from plaintiff and there is no intimation that the engineer had theretofore agreed to the suspension of the work and the payment of damages. In the letter of July 19th, which encloses an itemized statement of what plaintiff claims on account of suspension of the work, there is no intimation that the engineer had, some months prior or at any time, agreed that the work be suspended and that defendant would pay any damages plaintiff might sustain on account of such suspension. Nor is there anything in the supplemental contract of November 21, 1929, that would bear out plaintiff's contention that the engineer had agreed to the suspension of the work and the payment of damages. On the contrary it recites that plaintiff had suspended the work by reason of the non-

payment of the two monthly installments. That contract also states that plaintiff is making certain claims, but there is no word in the document that defendant's engineer had theretofore agreed to pay any of such claimed damages. The testimony of the defendant's engineer is in accordance with the written letters and supplementary contract and with a common sense view of the situation. It is highly improbable that he alone would take the responsibility of rendering the defendant liable for damages in such a large amount of money without referring the matter to the Board or consulting anyone in the matter. It is clear that the conversation between the parties merely showed the engineer thought plaintiff would be entitled to be paid for some damages it might sustain by reason of the suspension.

While what we have said necessitates a reversal of the judgment and a remandment of the cause, yet we think we ought to pass upon other points made, for the future guidance of the trial court.

Plaintiff contends that the measure of damages for the loss of the use of machinery and equipment is its fair market rental value. We think this is the law. (McCabe v. C. & N. W. Ry. Co., 215 Ill. App. 99; Gustafson et al. v. Mich. Cent. R.R. Co., 218 Ill. App. 402, affirmed in 296 Ill., 41) with the qualification that if plaintiff could reduce the damages by using the tools on other jobs, it would be required to do so.

Plaintiff further contends that it was entitled, as part of its damages, to interest on the 12½% retained by defendant under the contract during the ten months the work was suspended. We are unable to agree with this contention. The contract provided that the 12½% should be reserved by the defendant as part security for the faithful performance of the work and should not become due until the expiration of 30 days after the completion of the work and the delivery of the final certificate by the engineer, and after payment by the contractor of all claims for labor and material furnished in

payment of the two weekly installments. These amounts are small
that liability is being created, but it is not to be
assumed that payment of the weekly amounts is the only way
of obtaining the property. The defendant is not
in a position to pay the weekly amounts and is not
and will a court view it as such. It is clearly
that the defendant is not the owner of the property
defendant is not the owner of the property and is not
retaining the property in the hands of the defendant
for. It is clear that the conversation between the parties
shows the defendant's intent to retain the property
for some purpose in which the property is to be
used. While the defendant has not retained the property in the
hands of the defendant of the property, but he has
upon other parties, for the purpose of the property.
Violently contrary to the purpose of the law
of the use of the property and the defendant is not
owner. We think that the law is clear that the
law is clear that the law is clear that the law is clear
that it is clearly the property of the defendant and is not
other party, it will be viewed as such.
Violently contrary to the purpose of the law
of the property, to the extent that the law is clear
and contrary to the purpose of the law is clear. The law
clearly is clear that the law is clear that the law is clear
The law is clear that the law is clear that the law is clear
the purpose of the law is clear that the law is clear
and the purpose of the law is clear that the law is clear
clearly of the law is clear that the law is clear, and after

the performance of the work. Furthermore, it was stipulated on the trial that the defendant, without fault on its part, was unable to secure the necessary funds with which to pay the contractor, and under the law a municipal corporation is not liable for interest in the absence of an express agreement to pay interest, unless it has wrongfully obtained the money or has illegally withheld it' City of Peoria v. Construction Co., 169 Ill. 36; Vider v. City of Chicago, 154 Ill. 354; Conway v. City of Chicago, 237 Ill. 128.

Under the facts in the case the money was not illegally withheld from plaintiff.

Plaintiff further contends that upon the failure of the defendant to pay the December and January installments it had the right to suspend the work until the past due installments were paid and then to resume the work. While on the other side, the defendant's position is that plaintiff had no right to suspend the work since there was no express provision that the payment of any due installment was a condition precedent to the further continuance of the work. We think the plaintiff has the right to suspend the work on account of the non-payment of the December and January installments aggregating \$33,657.75. 2 Williston on Contracts, p. 1626; Geary v. Bangs, 37 Ill. App. 301; Dobbins v. Higgins, 78 Ill. 440; Keeler v. Clifford, 165 Ill. 544; Spiro v. Cable, 248 Ill. App. 343; Restatement of the Law of Contracts, vol. 1, p. 473.

Prof. Williston, in his work on contracts (vol. 2, p. 1626) says: "Frequently building construction contracts require payments to be made as the work progresses. Such contracts are not divisible for the several payments are not made in exchange for the work done up to the time of payment (though generally the amount is so calculated as not to exceed the value of the work done), but are part

payments on account of a total sum which is the price of the whole work. Non-payment of an installment of the price justifies the contractor in refusing to continue the work. Doubtless a day's delay in the payment of an installment will not justify permanent cessation of work, but it seems that the contractor might refuse to perform further until payment was made and, if it was delayed for an unreasonably long time, might refuse to go on with the work altogether."

In Geary v. Bangs, *supra*, (37 Ill. App. 301) it was held that a party to a contract engaged in its performance might, on the failure or refusal of the other party to pay an installment as provided for by the contract, abandon the further performance of the work and maintain an action for the work already done by him. In that case the court, speaking by Mr. Presiding Justice Moran, said (p. 303): "The first question of law presented for our determination upon the record, as it stands, is whether a party, who is engaged in the performance of a contract may, on the other party's refusal to *** (make) payment of an installment of money when due, abandon the further performance of the contract and sustain an action to recover for the work already performed." A number of cases are then analyzed and discussed, including Palm v. The Ohio & M. R. R. Co., 18 Ill. 217, (the case chiefly relied upon by counsel for defendant). The court then points out that in that case suit was brought to recover what profits the contractor might have made by completing the work. Obviously that is not the nature of the suit at bar. Continuing, the court said (p. 306): "We think, however, the rule indicated by the cases we have cited is the just and logical one. While it can not be said that a failure to pay an installment due on a contract is an absolute prevention of the performance, still we know that in many instances, particularly in building contracts, the non-payment of an installment when due will render it necessary for the

contractor to abandon work. But the true ground is that a refusal to pay in accordance with the terms of the agreement is a breach which indicates that the one who is guilty of it does not intend to be bound by the contract, and therefore the other party may rescind it and recover for the work he has done."

In Dobbins v. Higgins, supra, (78 Ill. 440) it was said (p. 441): "That there was a breach of contract on the part of appellants, cannot be contested. By their contract they were bound to pay on estimates at the end of each month. But they neglected or refused to pay for the work done in October, for twelve days or more, and a portion of that time after appellees had given them notice that a further failure to pay would be treated as a rescission, and they would be compelled to abandon the work, which the evidence shows they did, not from choice, but from necessity."

In Keeler v. Clifford, supra, (165 Ill. 544) it was held that upon the non-payment of an installment due under a contract, the contractor may abandon the contract and recover the amount actually due under the contract.

In Volume 1, Restatement of the Law of Contracts, p. 473, it is said: "3. A contracts to sell and deliver to B 100 tons of coal in each of six successive weeks. B contracts to pay \$8 a ton for each instalment on delivery. A default by A in delivering one or more instalments, or by B in paying for one or more instalments, is a total breach of the contract if the breach is material; otherwise it is a partial breach."

From the foregoing authorities and many others we might have cited, we are of opinion that the failure of the defendant to pay the two installments warranted plaintiff in suspending the work until the installments were paid. Whether plaintiff had a right, under the law, to resume work when defendant was in funds is immaterial because both parties agreed by the supplemental contract

on the other hand, the fact that the law is not a mere
 to pay in accordance with the law of the land is a
 established that the law is not a mere
 being by the law, but the law is not a mere
 and the law is not a mere law.

In the case of the law, the law is not a mere
 (4. 111): "The law is not a mere law of the land
 but the law is not a mere law of the land, but the law is not a mere
 pay an estimate of the law of the land, but the law is not a mere
 returned to pay for the law of the land, but the law is not a mere
 more, and a section of the law is not a mere law of the land, but the law is not a mere
 notice that a law is not a mere law of the land, but the law is not a mere
 also, and the law is not a mere law of the land, but the law is not a mere
 evidence that the law is not a mere law of the land, but the law is not a mere law of the land."

In the case of the law, the law is not a mere
 that the law is not a mere law of the land, but the law is not a mere law of the land,
 the law is not a mere law of the land, but the law is not a mere law of the land,
 usually one with the law.

In the case of the law, the law is not a mere
 it is not a mere law of the land, but the law is not a mere law of the land,
 each is not a mere law of the land, but the law is not a mere law of the land,
 for each is not a mere law of the land, but the law is not a mere law of the land,
 or each is not a mere law of the land, but the law is not a mere law of the land,
 is a mere law of the land, but the law is not a mere law of the land,
 with it is a mere law of the land."

From the foregoing, it is clear that the law is not a mere
 have been, as the law is not a mere law of the land, but the law is not a mere law of the land,
 and the law is not a mere law of the land, but the law is not a mere law of the land,
 until the law is not a mere law of the land, but the law is not a mere law of the land,
 under the law, the law is not a mere law of the land, but the law is not a mere law of the land,
 until the law is not a mere law of the land, but the law is not a mere law of the land."

that it might do so. Plaintiff having had the right to suspend the work on account of the default in payment of the installments, may recover as damages any direct loss sustained by it. Louisville & M. Ry. Co. v. Hellerbach, 105 Ind. 137; Selden Breck Const. Co. v. Regents of Mich., 274 Fed. 982. Of course it was plaintiff's duty to be diligent in seeing that the damages were kept at the lowest amount consistent with the situation which confronted it.

Defendant's contention that by Article 32 of the contract plaintiff's damages, occasioned by the suspension of the work, are limited to wages paid by it for necessary watchmen during the period the work was suspended and for extra premiums paid by plaintiff for its bond on account of the additional time required to complete the work, cannot be sustained. Article 32 provides that should the "contractor be obstructed or delayed in the *** prosecution or completion of any part" of the work "by any act or delay of the Sanitary District," then the time for the completion of the work so delayed should be extended for a period equivalent to the time lost, and it was expressly agreed that the contractor would not be entitled to any damages from the Sanitary District on account of any delay from the specified causes "except compensation for wages for extra time for any necessary watchmen and for extra premium paid on his bond actually paid by said contractor." We think the parties by the language used did not contemplate any delay in the completion of the work occasioned by the default of the Sanitary District in making monthly payments, and plaintiff's damages, if any, are not limited as defendant contends.

The contention of the defendant that the act of plaintiff in obtaining judgment for the amount of the two installments, which has since been paid, is res adjudicata of plaintiff's entire claim, - that plaintiff cannot split its cause of action, - is, we think, without merit. Plaintiff had a right to sue for each installment

as it came due. Marshall v. Grosse Clothing Co., 184 Ill. 421.

Plaintiff's case having been tried on the theory that it was entitled to recover because of the engineer's agreement with plaintiff, as above stated, and the argument in the briefs having been on the same theory, the judgment cannot stand for the reasons hereinbefore stated.

On a retrial of the case plaintiff will be required, under well established rules of law, to prove each item it claims and that any moneys claimed to have been paid out by it were reasonable in amount and necessary under the circumstances.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

37479

MARIE B. CROWE, Administratrix
of the Estate of Timothy J.
Crowe, Deceased,
Appellee,

vs.

CATHERINE McDONNELL, Executrix of
the last Will and Testament of
Edward McDonnell, Deceased,
Appellant.

7 45
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

277 I.A. 618³

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Timothy J. Crowe filed his claim in the Probate court of Cook county against the estate of Edward McDonnell, deceased, claiming he had lent McDonnell \$5,000 on October 26, 1929. There was a hearing before the court and the claim was allowed as of the 6th class for \$5362.50, being the face of the claim, with interest to be paid in due course of administration. An appeal was taken to the Circuit court of Cook county. The claimant, Timothy J. Crowe, died and his administratrix was substituted in his stead. There was a hearing before the court without a jury, the claim was allowed for the face of the claim with interest, and this appeal followed.

The record discloses that on October 26, 1929, the claimant, Timothy J. Crowe, made his check to the order of Edward McDonnell for \$5000. It was presented to the bank on which it was drawn and was paid. On the face of the check appears the following: "½ Int rate for loan." These words were written across the end of the check. Claimant produced this check on the hearing and it was received in evidence over objection. The attorney for claimant then testified that he was attorney for claimant at the hearing in the Probate court and that on that hearing the claimant, Timothy J. Crowe, testified that he personally gave the check to McDonnell as a cash loan; that it was to be repaid as soon as McDonnell could raise the money at one-half the regular interest rate, as shown

STATE

IN SENATE,
JANUARY 1, 1907.
REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE.

BY

JOHN W. BROWN, COMMISSIONER OF THE
LAND OFFICE.
SACRAMENTO, CALIFORNIA,
1907.

3771.A.618

REPORT OF THE
COMMISSIONER OF THE
LAND OFFICE.

THE LAND OFFICE OF THE STATE OF CALIFORNIA
HAS THE HONOR TO ACKNOWLEDGE THE RECEIPT OF
THE REPORT OF THE COMMISSIONER OF THE
LAND OFFICE, FOR THE YEAR 1906, AND
TO STATE THAT THE SAME HAS BEEN
FILED IN THE OFFICE OF THE
COMMISSIONER OF THE LAND OFFICE,
AND THAT THE SAME IS AVAILABLE FOR
REVIEW BY THE PUBLIC. THE REPORT
CONTAINS A DETAILED ACCOUNT OF THE
LANDS OF THE STATE, AND OF THE
MANNER IN WHICH THEY HAVE BEEN
ACQUIRED, AND OF THE MANNER IN WHICH
THEY ARE NOW BEING MANAGED. THE
REPORT ALSO CONTAINS A DETAILED
ACCOUNT OF THE REVENUE DERIVED FROM
THE LANDS OF THE STATE, AND OF THE
MANNER IN WHICH THE SAME HAS BEEN
EXPENDED. THE REPORT IS A
VALUABLE SOURCE OF INFORMATION
TO THE PUBLIC, AND IS WELL
WORTHY OF THE ATTENTION OF ALL
INTERESTED IN THE LANDS OF THE
STATE.

on the check, and that the money was never repaid.

McDonnell died and his widow was appointed executrix of his estate. She testified that she was present at the hearing in the Probate court, and the substance of her testimony is that she did not hear claimant, Crowe, there testify that he gave the check to McDonnell as a cash loan and that it would be repaid as soon as McDonnell could raise the money. She further testified that at the hearing in the Probate court her attorney was William A. Holly, (now Judge Holly of the U. S. District court.) When her examination was concluded a recess was taken so that Judge Holly could appear as a witness, and after a short time he appeared and testified. The substance of his testimony is that when claimant, Timothy J. Crowe, was called as a witness and started to testify, he objected that the witness was incompetent since McDonnell was then dead, and that the witness Crowe stated that if he could not tell about the talk he had with McDonnell at the time, he was "not going to say anything;" that if Crowe at that time did testify that he gave the check to McDonnell as a loan and was only going to charge one-half interest rate, he did not hear it.

This is the substance of the evidence in the case. At the conclusion of Judge Holly's testimony counsel for the defendant moved that the testimony of the attorney for claimant, to which we have above referred, be stricken on the ground that it was incompetent. There was considerable discussion between court and counsel, at the conclusion of which the court sustained the objection and the evidence was stricken. No objection was taken nor was any complaint made by counsel for claimant to the ruling of the court. After argument the court allowed the claim, holding that claimant made out a case as appeared from the face of the check on which the words above quoted were written.

For convenience the executrix of the McDonnell estate will

be referred to as the defendant.

The defendant contends that the fact that the claimant, Crowe, gave McDonnell his check for \$5000 and that the check was cashed by the payee, does not tend to prove McDonnell was indebted to Crowe, but that on the contrary the law will presume the check was given by Crowe in payment of an indebtedness which he owed to McDonnell. We think the law is as contended for by counsel for defendant. It has been repeatedly held that a check on a bank is not evidence of an indebtedness of the payee to the drawer of the check, but is, on the contrary, evidence of an indebtedness of the drawer of the check to the payee. Kinahan v. Butler, 133 Ill. App. 459; MacKenzie v. Barrett, 148 Ill. App. 414. A further contention of the defendant is that the memorandum appearing on the face of the check is "meaningless, without any legal significance;" and that since there is no evidence in the record to sustain the claim but the check itself, together with the memorandum, the judgment cannot stand and should be reversed, and Re Estate of Martine, 233 Ill. App. 94; Knoles v. Hill, 23 Ill. 259; and MacKenzie v. Barrett, supra, 148 Ill. App. 414, are cited. In these cases certain memoranda were before the court which it was contended showed that there was a loan of money on which it was sought to establish a claim, but in these cases the court held that the memoranda were uncertain and in some cases meaningless and too ambiguous on which to base a judgment. In this connection counsel say that the MacKenzie v. Barrett case is precisely in point.

In that case MacKenzie gave his check payable to Barrett for \$300 and there was an entry on MacKenzie's check stub, "Order of A. A. Barrett for loan \$300." MacKenzie gave another check payable to the order of the Aetna Life Insurance Co. for \$183.36 and on the check stub there appeared: "To the order of Aetna Life for A. A. Barrett, \$183.36." Claimant there also produced a receipt

from the manager of the Aetna Life Insurance co. which acknowledged receipt of the premium "on the life of Miss A. A. Barrett." There also appears to be what is apparently a check from MacKenzie to the order of A. A. Barrett for \$100, which was paid. On the stub of this check appears, "to the order of A. A. Barrett for loan, \$100." There is other evidence in the record of that case. The court held that the memoranda and the other evidence was insufficient to show that MacKenzie had lent money to Barrett. In that case it will be noted that the memoranda was written on the check stubs of the drawer of the checks and that nothing appeared on the check which was apparently given to the payee; while in the instant case the memorandum appears on the face of the check, and the wording is not the same.

in

Counsel in their brief/support of their contention say: "can it be said that the words ' $\frac{1}{2}$ Int rate for loan' appearing on the check import a loan from Crowe to McDonnell? Certainly not. If any meaning at all is to be given to the legend, it must be, in view of the presumption, that the check was given in payment of a debt, viz., ' $\frac{1}{2}$ Int rate for loan' owing from Crowe to McDonnell." We think this argument is unsound. If Crowe were paying $\frac{1}{2}$ the interest he owed McDonnell the word "rate" would have been omitted. If Crowe owed McDonnell a debt and was paying it by giving McDonnell the check for \$5000, the memorandum " $\frac{1}{2}$ Int rate for loan" would be wholly meaningless. If these words written on the face of the check mean that Crowe was paying McDonnell the interest on a loan made to Crowe by McDonnell, then such loan would be in the neighborhood of \$100,000, and if a loan of this amount were made it seems unlikely that McDonnell would not have some written evidence of the fact. And on the hearing it was stated by counsel for the defendant, in substance, that he was unable to obtain any such evidence.

We agree with the learned trial Judge that the memorandum

must be construed to mean that Crowe lent McDonnell \$5000 on which McDonnell was to pay but one-half of the ordinary interest rate. The memorandum is, " $\frac{1}{2}$ Int rate for loan."

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

RECEIVED
JAN 10 1964

The Commission has

THE JOURNAL OF THE ROYAL ANTHROPOLOGICAL INSTITUTE

607171c

THE ADJUTANT

... ..

37520 - 37521

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

RAY ZYK et al.,

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

ROCCO MARTINO and MIKE MARTINO,
Plaintiffs in Error.

277 I.A. 618⁴

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

The grand jury of Cook county returned two indictments against Ray Zyk, Rocco Martino, Mike Martino, John Romano, John Russo and Tony Brescia. The first count in one of the indictments charged the defendants with the crime of rape committed against Bessie Stahr; the second count charged that the defendants were guilty of contributing to the delinquency of Bessie Stahr. The other indictments are the same except that it was charged that the crimes were committed against Isabel Bulik. Ray Zyk was not apprehended. The defendants each entered a plea of not guilty, a jury was waived and there was a trial before the court. John Russo was found not guilty. The record is silent as to the disposition of the indictments as to the defendant Tony Brescia. Each of the defendants was found ^{not} guilty of the charge of rape. The defendants Romano Martino, Mike Martino and John Romano were found guilty of contributing to the delinquency of the girls, in each case. Rocco Martino was sentenced to the House of Correction for one year in each case, sentences to run consecutively. Mike Martino was sentenced to one year in the House of Correction in each case, the sentences to run concurrently. John Romano was sentenced to the House of Correction for six months in each case, the sentences to run concurrently. Rocco Martino and Mike Martino prosecute this writ of error.

The first point made by counsel for defendants in their brief is that the trial Judge manifested throughout the trial prejudice against each of the defendants so that they did not have a

EXHIBIT - 1721

PROSECUTION OF THE STATE OF ILLINOIS
IN CRIMINAL CASE NO. 1721

VS.

RAY, ALAN

JOSEPH MARTINO and ALAN RAY,
Defendants in Error.

1721-1721

THE STATE OF ILLINOIS
IN CRIMINAL CASE NO. 1721

The first jury at which the case was tried was
composed of six men, five of whom were
Ray and Tony Bressler. The third jury in the case was
charged the defendant with the crime of rape and was
Bessie Stern; the second jury charged the defendant with
guilty of contributing to the delinquency of Bessie Stern. The
other indictments are the same except that it was charged that the
crimes were committed against Joseph Bressler. The jury was not
handed. The defendant each entered a plea of not guilty, a jury
was waived and there was a trial before the court. John Bressler was
found not guilty. The record in this case is the indictment of the
indictments as to the defendant Tony Bressler, one of the defendants
was found guilty of the crime of rape. The defendant's name
Martino, Alvin Bressler and to a woman who found guilty of contrib-
uting to the delinquency of the child, in each case. Joseph Bressler
was sentenced to the house of correction for one year in each case,
sentences to the house of correction. The sentence was pronounced in the
year in the house of correction in each case, the sentence to the
concurrently. John Bressler was sentenced to the house of correction
for six months in each case, the sentence in each case.
Joseph Bressler and Alvin Bressler were sentenced to the house of
The first jury was composed of six men, five of whom were
Ray and Tony Bressler. The third jury in the case was
charged the defendant with the crime of rape and was
Bessie Stern; the second jury charged the defendant with
guilty of contributing to the delinquency of Bessie Stern. The
other indictments are the same except that it was charged that the
crimes were committed against Joseph Bressler. The jury was not
handed. The defendant each entered a plea of not guilty, a jury
was waived and there was a trial before the court. John Bressler was
found not guilty. The record in this case is the indictment of the
indictments as to the defendant Tony Bressler, one of the defendants
was found guilty of the crime of rape. The defendant's name
Martino, Alvin Bressler and to a woman who found guilty of contrib-
uting to the delinquency of the child, in each case. Joseph Bressler
was sentenced to the house of correction for one year in each case,
sentences to the house of correction. The sentence was pronounced in the
year in the house of correction in each case, the sentence to the
concurrently. John Bressler was sentenced to the house of correction
for six months in each case, the sentence in each case.
Joseph Bressler and Alvin Bressler were sentenced to the house of
The first jury was composed of six men, five of whom were
Ray and Tony Bressler. The third jury in the case was
charged the defendant with the crime of rape and was
Bessie Stern; the second jury charged the defendant with
guilty of contributing to the delinquency of Bessie Stern. The
other indictments are the same except that it was charged that the
crimes were committed against Joseph Bressler. The jury was not
handed. The defendant each entered a plea of not guilty, a jury
was waived and there was a trial before the court. John Bressler was
found not guilty. The record in this case is the indictment of the
indictments as to the defendant Tony Bressler, one of the defendants
was found guilty of the crime of rape. The defendant's name
Martino, Alvin Bressler and to a woman who found guilty of contrib-
uting to the delinquency of the child, in each case. Joseph Bressler
was sentenced to the house of correction for one year in each case,
sentences to the house of correction. The sentence was pronounced in the
year in the house of correction in each case, the sentence to the
concurrently. John Bressler was sentenced to the house of correction
for six months in each case, the sentence in each case.
Joseph Bressler and Alvin Bressler were sentenced to the house of

fair trial. In support of this it is said that the court questioned Isabel Bulik and John Romano at great length, and that similar conduct has been condemned by our Supreme court, citing People v. Bernstein, 250 Ill. 63; People v. Schultz, 300 Ill. 601, and People v. Giacomino, 347 Ill. 523. The Schultz and Bernstein cases were jury trials and are therefore clearly inapplicable here. In the Giacomino case a jury had been waived. In that case the court said (p. 523): "Counsel for defendants claim that the Judge displayed hostility toward the witnesses, subjected them to severe cross examination, plainly indicated he did not credit their testimony and was determined to bring out evidence to convict defendants. Where a cause is tried before a jury the trial Judge must not indulge in extensive questioning or indicate by his conduct either favor or disfavor toward parties or witnesses." The court then refers to the Bernstein case, and to the fact that that case was tried before the court, but continuing the court said that although a jury was waived, "the principle enunciated in the former case (Bernstein case) is not to be ignored even when a jury has been waived. In either event it is the duty of the judge to arrive at his conclusions from a calm, unbiased consideration of the facts. He should be neither prosecutor nor defender. While he is a searcher for the truth it is not his duty to discomfit and confuse witnesses by his questions or attitude."

In the instant case the court asked counsel if there was any objection to his questioning Isabel Bulik and John Romano, and counsel stated there was no objection. Moreover, we think the questioning of these witnesses by the court was entirely fair and unbiased and that he was seeking only to bring out the facts. There is no merit in the contention made.

Each of the defendants further contends that he was not proven guilty beyond a reasonable doubt.

The record discloses that the two girls, Isabel Bulik and

Bessie Stahr, lived in Harvey, Illinois, and on the evening of August 11, 1933, walked about a mile and a half to a public park in Harvey where she was dancing and other amusement. Both girls were seventeen years of age.

On the same evening defendants Mike Martino, 22 years old, and his brother Rocco, 19, who lived in Blue Island, Illinois, borrowed a Chevrolet car and drove to the park in Harvey, taking the defendant Brescia with them. Mike Martino was acquainted with Isabel Bulik, having called on her a number of times some time prior to the evening in question. Shortly after they arrived at the park the three boys met the two girls. Mike had his guitar and played for their amusement. About eleven o'clock the defendants Ray Zyk, John Romano and John Russo, who were also at the park, met the Martino boys and Brescia, who introduced them to the girls. It seems that Mike Martino was acquainted with Zyk prior to that time. The six boys and the two girls visited for some time and about midnight the girls stated they wanted to go home. Bessie Stahr said that before leaving the park she wanted to find her older sister who was also supposed to be at the park, and some of the boys and Bessie looked for the sister but could not find her. Upon returning they decided to go home and one of the girls suggested to the Martinos that they get rid of Tony Brescia so that the two girls and the two Martino boys could go home in the automobile together; thereupon Tony Brescia went with Zyk and the other boys in Zyk's car, and the two cars started away toward Harvey, the Zyk car apparently following the other car. When they came to Harvey the girls said they were not driving toward home and suggested that the Martinos turn toward their home, but the Martinos said they were taking a little ride first. They then drove around for some time and finally stopped and the Zyk car drew up by the side of the Martino car. Zyk and Romano got out of the car, came over to the

Martino car, and there is evidence to the effect that Zyk forcibly took Bessie Stahr from the Martino car into his own car. John Romano got into the Martino car with Isabel Bulik and the two Martino boys were ordered out of their car. All of the boys except Zyk and Romano walked away a short distance and while they were away Zyk attacked the Stahr girl and Romano the Bulik girl. The boys who walked away then returned and Bessie Stahr testified that Rocco Martino got in Zyk's car and attacked her. There is further evidence to the effect that John Russo, upon returning, endeavored to attack the Bulik girl but did not do so. Rocco Martino denied that he attacked the Stahr girl, but admitted that when he returned from the walk he got into the Zyk car where Bessie was. A passer-by testified that he heard some screaming and the police were notified and came and arrested the six boys and the two girls.

There is also evidence to the effect that no force was used by the boys, contrary to the testimony of the girls. The court expressly found that no force was used and therefore the defendants were not guilty of rape. The court apparently found that the Martino boys had connived and conspired with the boys in the Zyk automobile to drive the girls around and when they arrived at a lonely place to permit the boys in the Zyk car to attack the girls, and for this reason found both of the Martino boys guilty in each case. The court was also apparently of the opinion that defendant Rocco Martino had attacked Bessie Stahr, and for that reason gave him another year in the House of Correction.

Upon a careful consideration of all the evidence in the record we are of opinion that the finding of the court that the two Martino boys conspired with the defendants, as above stated, is contrary to the great weight of the evidence. The testimony of all the parties who were interrogated on the subject, including the two girls, is to the effect that there was no previous arrangement or

Martin was not at the scene of the shooting. He was at the time of the shooting at the home of the victim, and he was not at the scene of the shooting. He was at the time of the shooting at the home of the victim, and he was not at the scene of the shooting.

understanding between the Martino boys and the boys who were in the Zyk car. We are therefore of the opinion that the judgment against Mike Martino cannot be sustained. We are also of the opinion that the finding against Rocco Martino, on this same question, cannot be sustained.

Since the judgment against Mike and Rocco Martino must be reversed for the reasons above stated, we do not pass upon the contention made by counsel on behalf of Rocco Martino, that the finding of the court to the effect that Rocco Martino had attacked Bessie Stahr was not proven beyond a reasonable doubt, and the cause as to Rocco Martino will be remanded for a new trial on that issue.

John Romano, who got out of the Zyk car and went to the Martino car and attacked Isabel Bulik, was, in our opinion, more guilty than Rocco Martino. At the outset he was the aggressor. Zyk and Romano are both low and vicious characters. The court sentenced Romano to but six months in the House of Correction because he had admitted attacking the girl. We think it certain that Rocco Martino was not more guilty than Romano, and yet he is given a sentence of two years while Romano gets off with six months.

The judgment of the Criminal court of Cook County is reversed as to Mike Martino, and the judgment as to Rocco Martino is reversed and the cause remanded as to him, in accordance with the views hereinabove expressed.

JUDGMENT REVERSED AS TO MIKE MARTINO.
JUDGMENT REVERSED AND CAUSE REMANDED
AS TO ROCCO MARTINO.

McSurely and Hatchett, JJ., concur.

understanding between the parties and the fact that the
the day. He was aware of the situation and the fact
against him having been considered. He was also of the
opinion that the finding against him was not
correct, and he was not.

Since the finding against him was not correct, he
traveled for the purpose of his trip, and he was not
found to be correct in his finding. He was not
of the fact that he was not correct in his finding.
He was not correct in his finding. He was not
correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.

John Doe, who was not of the fact that he was not
correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.

The finding of the District Court of the fact that he was not
correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.
He was not correct in his finding. He was not correct in his finding.

THE COURT OF THE DISTRICT COURT OF THE FACT THAT HE WAS NOT
CORRECT IN HIS FINDING. HE WAS NOT CORRECT IN HIS FINDING.
HE WAS NOT CORRECT IN HIS FINDING. HE WAS NOT CORRECT IN HIS FINDING.

He was not correct in his finding. He was not correct in his finding.

37534

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JULIUS REZNIK,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

277 I.A. 619¹

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this writ of error Julius Reznik seeks to reverse an order entered by the Criminal court of Cook county, by which he was adjudged to be in contempt of court and sentenced to confinement in the county jail for six months, and a fine of \$2,000 was imposed. There appears in the record an order finding Reznik guilty of a direct contempt of court and sentencing and fining him as above stated, and in addition that he be suspended from practicing in the Criminal court for two years. The provision for the suspension from practicing in the Criminal court for two years seems to have been eliminated from the order as finally entered.

The defendant, having been found guilty of a direct criminal contempt, the entire record before us consists of the order entered by the court. This is the proper practice. People ex rel. Bain v. Feinberg, 266 Ill. App. 306. The contempt charged being direct and criminal, no evidence could properly be heard. If evidence were necessary to determine whether Reznik was guilty of such contempt then the contempt would not be direct but constructive, and the proper practice would require a charge to be filed against him and leave given him to file his answer. If his answer were sufficient to purge him, he must be discharged and no evidence could be heard. People ex rel. Bain v. Feinberg, supra; People v. Bain, 268 Ill. App. 192; People v. Anderson, 272 Ill. App. 93; People ex rel. Burgeson v. W. Chicago Park Comm., 275 Ill. App. 387; People v. Hogan, 256 Ill. 496; People v. Cochrane, 307 Ill. 126; and People v. McDonald, 314 Ill. 548. Under these authorities the law in

this State is that in a proceeding for a criminal contempt no evidence is heard, whether the contempt be direct or constructive. This being the procedure it follows that "the order of commitment must be scrutinized carefully in order to determine whether it sets out the facts constituting the offense so fully and certainly as to show that the court was authorized to make the order." (People v. Bain, supra, 268 Ill. App. 192.)

The order recites that on April 20, 1934, the case of People v. Timothy Murphy, Frank J. Coyne and Philip Mansfield was before the Criminal Court of Cook County for the purpose of passing sentence on the defendant, Mansfield, who had theretofore been found guilty by a jury; that the matter of the contempt of Julius Reznik was being considered; that the court finds that when the criminal case above mentioned against the three defendants was on trial on March 20th, Julius Reznik appeared as counsel for the defendant Mansfield; that the trial resulted in a verdict finding Coyne guilty of robbery with a gun, and finding Mansfield guilty under the habitual criminal count of the indictment, which verdict was returned in open court on March 22, 1934; that Reznik was present at that time and on behalf of Mansfield made a motion for a new trial, which motion on March 30th was overruled, at which time Reznik was also present representing Mansfield; that at that time the matter of sentencing Mansfield on the verdict was postponed to April 13th, and on that day Reznik did not appear but "deliberately and willfully and contumaciously absented himself and offered no excuse to this Court for his failure to appear and in no way advised this Court that he would not appear. *** that it is within the personal knowledge of this Judge *** that the contemnor Julius Reznik absented himself deliberately *** and that his conduct in that regard and his failure to appear was willful. The Court further finds that the contemnor Julius Reznik knew that this cause was set for a hearing before this Court on the 13th day of April, A.D. 1934,

(... ..)

for a hearing before this Court on the 12th day of April, 1934. The Court ordered that on April 12, 1934, the case of Perkins v. United States, 284 U.S. 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967

for the purpose of passing sentence on his client;" that he made no effort to communicate with the court or offer any excuse "for his deliberate and contumacious conduct in secreting himself and concealing himself from the jurisdiction of this Court and that said contennor persisted in so wilfully absenting and secreting himself so that the process of this Court could not be served upon him *** until the day of the entry of this order when an attachment heretofore issued by this Court was served upon him."

The order also recites that the court finds that while the criminal case was on hearing against the three defendants, Reznik "advised this court that the defendant Frank J. Coyne was innocent" of the crime with which he was charged and that Reznik said he knew the man who was guilty of the crime for which Coyne was being tried; that such guilty person was not his client, nor was the relation of attorney and client existing between him and the guilty person; that notwithstanding such knowledge Reznik "permitted the trial of said cause to proceed against the defendant Frank Coyne and failed and refused, deliberately and willfully, although an attorney and officer of this Court, to place before this Court the information he possessed concerning the innocence of the defendant Frank Coyne and the guilt of another person *** but deliberately stood by and willfully permitted a man whom he knew to be innocent to be incarcerated in the common jail of Cook County from the 31st day of January, A. D. 1934, to and including the 13th day of April, A. D. 1934," Coyne being unable to furnish bail; that Reznik could have prevented such incarceration and could have prevented the verdict of guilty being returned against Coyne; that because of such contumacious conduct of Reznik the court was compelled to grant Coyne a new trial; that this "was an imposition on this Court and was calculated and intended to and did impede, embarrass and obstruct this Court in the due administration of

of justice." The court finds that Reznik is present in open court and is guilty of a direct, deliberate contempt and it was ordered that he be committed to the county jail for 6 months and fined \$2,000.

From the foregoing it appears that the court found Reznik guilty of contempt for two reasons: (1) That he failed to appear on April 13th, at which time the matter of sentencing Mansfield, his client, was before the court; and (2) That he failed and refused to advise the court of the name of the guilty man who had committed the offense for which the defendant Coyne was on trial.

Counsel for the People contend that the act of Reznik in "deliberately and wilfully absenting himself from the court room of Judge Michael Feinberg was a contempt of court," and in support of this reliance is chiefly placed upon In re Clark, 126 Mo. App. 391. In that case, which was a proceeding for writ of habeas corpus brought by Clark for his release from custody, it appeared that Clark had been counsel for one of the parties in a civil suit, and while that case was being heard absented himself a number of times, which delayed the court in the trial of the case and he was adjudged to be in contempt of court. He filed a petition for a writ of habeas corpus. The court there said: "The judge could not have been of the opinion that the delay on the part of Mr. Clark was intentional without some probable evidence of the fact, and as this proceeding is a collateral attack of the judgment every reasonable intendment must be indulged in support of the judgment. Its language imports that some inquiry was had and the petitioner adjudged guilty of contempt upon the evidence heard." In that case the court gave Clark, the attorney, a hearing and apparently on that hearing the evidence disclosed that he absented himself from the trial without any justification and was adjudged guilty of contempt in delaying the court proceedings; but the practice in Missouri is entirely different from the practice in contempt

cases in this State. In this State no evidence could properly be heard, Reznik having been charged with a direct criminal contempt. The court could have found him guilty only for something that occurred in the presence of the court which required no evidence. In the instant case, while Reznik, in absenting himself, might be guilty of contempt of court, yet the reason why he failed to appear could not be known to the trial Judge without evidence. There may have been a number of reasons why he was not there when his client was to be sentenced.

Was Reznik guilty of a direct contempt in failing and refusing to give the court the name of the man who Reznik stated had committed the offense for which Coyne was on trial?

The record discloses that during the progress of the criminal trial, Reznik, who represented the defendant Mansfield, told the trial Judge that Coyne was innocent and that he knew the name of the person who was guilty of the crime for which Coyne was on trial, and the order recites that Reznik failed and refused to give the information to the trial Judge concerning this question, but "permitted the trial *** to proceed against the defendant Frank Coyne." It might be that if Reznik had given the court the information, such information would have prejudicially affected his client Mansfield, which of course might have been sufficient reason for withholding the information. The order further recites that after the jury, by its verdict, found Coyne guilty, the court was compelled to give him a new trial because Reznik had failed to give the court the information which he said he possessed as to the guilty party. It seems clear that after the verdict and pending the motion for a new trial, the court could have called Reznik to the witness stand, propounded questions to him, and if Reznik still persisted in his refusal to answer he could then be adjudged in contempt of court.

cases in this State. In this case on evidence being brought in
forth, the jury having been advised with a direct charge, the
The court said that the jury had only one thing to do, and that
was to find the facts in the case, and to apply the law as
given to them by the court. The court said that the jury
should not be influenced by any feelings or passions, but
should be guided by the evidence and the law. The court said
that the jury should not be influenced by any feelings or
passions, but should be guided by the evidence and the law.

The court said that the jury should not be influenced by any
feelings or passions, but should be guided by the evidence and
the law. The court said that the jury should not be influenced
by any feelings or passions, but should be guided by the
evidence and the law. The court said that the jury should not
be influenced by any feelings or passions, but should be guided
by the evidence and the law. The court said that the jury
should not be influenced by any feelings or passions, but should
be guided by the evidence and the law. The court said that the
jury should not be influenced by any feelings or passions, but
should be guided by the evidence and the law.

The court said that the jury should not be influenced by any
feelings or passions, but should be guided by the evidence and
the law. The court said that the jury should not be influenced
by any feelings or passions, but should be guided by the
evidence and the law. The court said that the jury should not
be influenced by any feelings or passions, but should be guided
by the evidence and the law. The court said that the jury
should not be influenced by any feelings or passions, but should
be guided by the evidence and the law. The court said that the
jury should not be influenced by any feelings or passions, but
should be guided by the evidence and the law. The court said
that the jury should not be influenced by any feelings or
passions, but should be guided by the evidence and the law.

We think the findings in the order are insufficient to warrant the court in holding Reznik to be in contempt for failure to disclose the name of the person whom Reznik said was guilty of the crime for which Coyne was on trial.

The judgment of the Criminal Court of Cook County is reversed.

JUDGMENT REVERSED.

McSurely and Matchett, JJ., concur.

The judgment of the Federal Court of Canada is that the evidence is not sufficient to establish that the appellant was a member of the Communist Party of Canada at the time of the conspiracy.

1897

Case 1:17-cv-01001 Document 1-1 Filed 07/26/17 Page 1 of 1

37559

HENRY LOEDING,
Appellant,

vs.

EAST BROTHERS COAL COMPANY,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

277 I.A. 619²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$2152.37, which he claimed to be due him as a balance for salary. There was a trial before the court without a jury and a finding and judgment in defendant's favor and plaintiff appeals.

The record discloses that defendant was engaged in the coal business in Chicago and plaintiff was in its employ for ten or eleven years at different times. The last time he went to work March 22, 1929, and quit September 9, 1933. It is plaintiff's position that during this time he was employed at a salary of \$50 a week; that from July 1, 1931, he was paid only part of his salary so that when he left in September, 1933, there was a balance due him for the amount claimed.

Defendant's position was that about July 1, 1931, plaintiff and the two other employees of defendant met defendant's president and discussed the fact that the defendant coal company had been losing money and was not able to continue paying the salary of the three employees, who were the only employees of the defendant company. One of the defendant's employees was receiving a salary of \$500 a month, another \$225 a month, and plaintiff \$50 a week. At that time it was agreed that instead of defendant's business being closed up, the three employees would draw whatever salary the business warranted after paying its expenses, and that their salaries should be proportioned according to the salaries they had theretofore received. On the other hand, plaintiff's position is that there was no such agreement; that the matter was discussed

RECEIVED
JAN 10 1951

10

WEST VIRGINIA POWER CO.,
MARTINSBURG, W. VA.

2775 I.A. 019

RECEIVED
JAN 10 1951

Enclosed for the attention of the
cover \$150.00, which he stated to be the amount of
salary. There was a trial before the court without a jury and a
finding and judgment in defendant's favor and plaintiff awarded.
The court discussed that defendant was engaged in the
coal business in Chicago and plaintiff was in the coal business
or eleven years at different times. The first time he was in
March 22, 1937, and until September 9, 1938. It is plaintiff's
position that during this time he was employed as a salary of \$50
a week; that from July 1, 1941, to the time of his death
as that was his job in defendant's plant, there was a witness to
him for the court record.

Defendant's position was that from July 1, 1941, plaintiff
and the two other employees of defendant had defendant's position
and discussed the fact that the defendant was engaged had been
losing money and was not able to continue paying the salary of
the three employees, who were the three employees of the defendant
company. One of the defendant's employees was receiving a salary
of \$100 a week, another \$75 a week, and plaintiff was a week.
At that time it was argued that instead of defendant's position
being closed up, the three employees would then receive salary
the business continued after paying the employees, and that their
relatives should be provided financial assistance in the matter and that
testimony received. On the other hand, plaintiff's position is
that there are no such agreements; that the matter was discussed

at that time and that the agreement was they should draw such money proportionately, but that it would be only payment on account and not in full of the salary. The court found in favor of defendant's contention and plaintiff's position is that the finding and judgment are against the manifest weight of the evidence.

Plaintiff gave testimony to substantiate his version of the matter. Defendant called S. W. East, one of its employees, and John Evans, the other. They both testified, as did the president, John Leonard East, that there was an agreement that instead of closing up the business the three employees might continue and draw such salaries as the business warranted, in the same proportion as they had theretofore received. Plaintiff also offered evidence tending to show that from July 1st until plaintiff quit work in September, 1933, the parties had been paid substantially in accordance with the agreement as contended for by the defendant. Plaintiff had been paid \$3573.18; S. W. East \$7803.85, and Evans \$3370.36. The latter also received some other remuneration which would indicate that they had been paid proportionately to the salaries theretofore received by them. Plaintiff testified there was a conversation between the parties about July 1, 1931, and that from that time none of the three employees received the amount of salary they had been drawing because, as plaintiff testified, "There was no money available. *** There were a number of conversations in which it was explained that there wasn't enough money coming in to make up current salaries, and therefore we had to make out with what we received, what was left after other obligations were taken care of." Plaintiff further testified; "There was very little business. *** We didn't pay our bills promptly during that period. I would consider the East Brothers Coal Company insolvent during the year 1933." He further testified that the money "never was distributed on a pro rata basis;" and further, that he also understood there was money coming to him on account of salary, and that "I was simply taking my share

of that month's earnings." Plaintiff further testified: "I tried to resign to S. W. East.*** I had no money to force a resignation." Just why plaintiff could not resign it is difficult for us to understand. Obviously, he could have walked out any time he wanted to, but he apparently stayed on because he was making a little money. While plaintiff testified the money had not been divided pro rata among the three employees, and although he kept the books, he nowhere points out that the books did not substantiate defendant's contention that the money had been so divided.

Near the close of the case plaintiff, in response to questions put to him by the court, testified: "S. W. East informed me that he was apportioning the money on a pro rata basis," but that he did not know he was being paid in full.

There is other evidence in this record, all tending to show that defendant treated plaintiff with a great deal of consideration. Plaintiff's own testimony shows that the business was insolvent and had been running behind for some time; yet he takes the position that his salary should not be reduced.

Upon a careful consideration of all the evidence in the record we think the finding of the trial Judge was in accordance with the evidence, and the judgment of the Municipal court of Chicago is therefore affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

of last month's statement. "I think
to reach the 11th Street. I was no more in the
last was almost until the 11th Street. I was
unusually. I think I was in the last of the
to, but the statement made in the last of the
copy. The statement made in the last of the
the last of the statement, but I think the last
he was in the last of the statement, but I think
and a statement that the last of the statement
back the last of the statement, but I think
the last of the statement, but I think the last
that he was opposing the last of the statement, but I think
he did not know he was in the last of the statement.
There is a statement in the last of the statement, but I think
that the last of the statement, but I think the last
the last of the statement, but I think the last
had been in the last of the statement, but I think
that the last of the statement, but I think the last
Upon a careful consideration of the last of the statement
record as the last of the statement, but I think the last
with the statement, but I think the last of the statement
Chicago is the last of the statement.

Chicago is the last of the statement.

37322

LAWRENCE AHRENS,
Defendant in Error,

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Plaintiff in Error.

49
7

ERROR TO SUPREME COURT
OF COOK COUNTY.

277 I.A. 619³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for personal injuries received while riding in an automobile, caused, as he claims, by the negligence of the City in permitting the roadway to be broken, rough and uneven. Upon trial he had a verdict for \$20,000 upon which judgment was entered, and defendant asks for a reversal.

The accident happened on the evening of February 15, 1931; plaintiff was riding as a passenger in an automobile driven southerly on Western avenue at about 77th street; he was sitting in the rear seat on the left hand side; next him sat his wife, with a Mr. and Mrs. Budek on the extreme right; the car was driven by Mr. Swiss, who with his wife was on the front seat; the street was rather poorly lighted; the automobile was traveling between 25 and 35 miles an hour.

About February 13th defendant had commenced tearing up the street pavement on Western avenue; starting at about 80th street and moving north the street pavement was torn up for a distance of about 303 feet; there is a street car line on Western avenue at this point and the excavation extended westerly from the west line of the street car track; the strip torn up was about five or six feet wide except for a short distance at its north end, where it was about ten feet wide; the street was paved with asphalt which in this strip was cut into pieces about one-half by two feet, which pieces were thrown promiscuously in the space where the cut was made; there was sufficient room west of this strip of cut roadway so that cars could

2.578

1861

Delivered by

65

[illegible]

1895-1896

875. A. 19

THE UNIVERSITY OF CHICAGO PRESS

1. Initial report - received in letter 1-

100-443887-100

Page 11 of 11

THE ABOVE IS A TRUE AND CORRECT COPY OF THE ORIGINAL AS SUBMITTED TO THE COMMISSIONER OF THE GENERAL LAND OFFICE, ON THE 15TH DAY OF NOVEMBER, 1900.

...and the fact that the ... are not ...

The oldest known manuscript of the text is the 12th-century

1/20/50 David Silverman, 1110 1st St. S. E. Atlanta, Georgia

ON VARIOUS VEGETABLES AND FRUITS

... ..

...and the ...

1911-12 1912-13 1913-14 1914-15 1915-16 1916-17 1917-18 1918-19 1919-20 1920-21 1921-22 1922-23 1923-24 1924-25 1925-26 1926-27 1927-28 1928-29 1929-30 1930-31 1931-32 1932-33 1933-34 1934-35 1935-36 1936-37 1937-38 1938-39 1939-40 1940-41 1941-42 1942-43 1943-44 1944-45 1945-46 1946-47 1947-48 1948-49 1949-50 1950-51 1951-52 1952-53 1953-54 1954-55 1955-56 1956-57 1957-58 1958-59 1959-60 1960-61 1961-62 1962-63 1963-64 1964-65 1965-66 1966-67 1967-68 1968-69 1969-70 1970-71 1971-72 1972-73 1973-74 1974-75 1975-76 1976-77 1977-78 1978-79 1979-80 1980-81 1981-82 1982-83 1983-84 1984-85 1985-86 1986-87 1987-88 1988-89 1989-90 1990-91 1991-92 1992-93 1993-94 1994-95 1995-96 1996-97 1997-98 1998-99 1999-00 2000-01 2001-02 2002-03 2003-04 2004-05 2005-06 2006-07 2007-08 2008-09 2009-10 2010-11 2011-12 2012-13 2013-14 2014-15 2015-16 2016-17 2017-18 2018-19 2019-20 2020-21 2021-22 2022-23 2023-24 2024-25 2025-26 2026-27 2027-28 2028-29 2029-30 2030-31 2031-32 2032-33 2033-34 2034-35 2035-36 2036-37 2037-38 2038-39 2039-40 2040-41 2041-42 2042-43 2043-44 2044-45 2045-46 2046-47 2047-48 2048-49 2049-50 2050-51 2051-52 2052-53 2053-54 2054-55 2055-56 2056-57 2057-58 2058-59 2059-60 2060-61 2061-62 2062-63 2063-64 2064-65 2065-66 2066-67 2067-68 2068-69 2069-70 2070-71 2071-72 2072-73 2073-74 2074-75 2075-76 2076-77 2077-78 2078-79 2079-80 2080-81 2081-82 2082-83 2083-84 2084-85 2085-86 2086-87 2087-88 2088-89 2089-90 2090-91 2091-92 2092-93 2093-94 2094-95 2095-96 2096-97 2097-98 2098-99 2099-00 2100-01 2101-02 2102-03 2103-04 2104-05 2105-06 2106-07 2107-08 2108-09 2109-10 2110-11 2111-12 2112-13 2113-14 2114-15 2115-16 2116-17 2117-18 2118-19 2119-20 2120-21 2121-22 2122-23 2123-24 2124-25 2125-26 2126-27 2127-28 2128-29 2129-30 2130-31 2131-32 2132-33 2133-34 2134-35 2135-36 2136-37 2137-38 2138-39 2139-40 2140-41 2141-42 2142-43 2143-44 2144-45 2145-46 2146-47 2147-48 2148-49 2149-50 2150-51 2151-52 2152-53 2153-54 2154-55 2155-56 2156-57 2157-58 2158-59 2159-60 2160-61 2161-62 2162-63 2163-64 2164-65 2165-66 2166-67 2167-68 2168-69 2169-70 2170-71 2171-72 2172-73 2173-74 2174-75 2175-76 2176-77 2177-78 2178-79 2179-80 2180-81 2181-82 2182-83 2183-84 2184-85 2185-86 2186-87 2187-88 2188-89 2189-90 2190-91 2191-92 2192-93 2193-94 2194-95 2195-96 2196-97 2197-98 2198-99 2199-00 2200-01 2201-02 2202-03 2203-04 2204-05 2205-06 2206-07 2207-08 2208-09 2209-10 2210-11 2211-12 2212-13 2213-14 2214-15 2215-16 2216-17 2217-18 2218-19 2219-20 2220-21 2221-22 2222-23 2223-24 2224-25 2225-26 2226-27 2227-28 2228-29 2229-30 2230-31 2231-32 2232-33 2233-34 2234-35 2235-36 2236-37 2237-38 2238-39 2239-40 2240-41 2241-42 2242-43 2243-44 2244-45 2245-46 2246-47 2247-48 2248-49 2249-50 2250-51 2251-52 2252-53 2253-54 2254-55 2255-56 2256-57 2257-58 2258-59 2259-60 2260-61 2261-62 2262-63 2263-64 2264-65 2265-66 2266-67 2267-68 2268-69 2269-70 2270-71 2271-72 2272-73 2273-74 2274-75 2275-76 2276-77 2277-78 2278-79 2279-80 2280-81 2281-82 2282-83 2283-84 2284-85 2285-86 2286-87 2287-88 2288-89 2289-90 2290-91 2291-92 2292-93 2293-94 2294-95 2295-96 2296-97 2297-98 2298-99 2299-00 2300-01 2301-02 2302-03 2303-04 2304-05 2305-06 2306-07 2307-08 2308-09 2309-10 2310-11 2311-12 2312-13 2313-14 2314-15 2315-16 2316-17 2317-18 2318-19 2319-20 2320-21 2321-22 2322-23 2323-24 2324-25 2325-26 2326-27 2327-28 2328-29 2329-30 2330-31 2331-32 2332-33 2333-34 2334-35 2335-36 2336-37 2337-38 2338-39 2339-40 2340-41 2341-42 2342-43 2343-44 2344-45 2345-46 2346-47 2347-48 2348-49 2349-50 2350-51 2351-52 2352-53 2353-54 2354-55 2355-56 2356-57 2357-58 2358-59 2359-60 2360-61 2361-62 2362-63 2363-64 2364-65 2365-66 2366-67 2367-68 2368-69 2369-70 2370-71 2371-72 2372-73 2373-74 2374-75 2375-76 2376-77 2377-78 2378-79 2379-80 2380-81 2381-82 2382-83 2383-84 2384-85 2385-86 2386-87 2387-88 2388-89 2389-90 2390-91 2391-92 2392-93 2393-94 2394-95 2395-96 2396-97 2397-98 2398-99 2399-00 2400-01 2401-02 2402-03 2403-04 2404-05 2405-06 2406-07 2407-08 2408-09 2409-10 2410-11 2411-12 2412-13 2413-14 2414-15 2415-16 2416-17 2417-18 2418-19 2419-20 2420-21 2421-22 2422-2

Copyright 1991 by the American Psychological Association or one of its allied publishers. This article is intended solely for the personal use of the individual user and is not to be disseminated broadly.

tion ma

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

and would not have to pay for the same. The Government would not have to pay for the same.

moving north the above mentioned area will be in line with the

;904? 80F

and the execution of the

789 762 : 762 762 ; 762 762

For a copy of this report, contact the author, Dr. Robert L. Taylor, at the address above.

What is the first step in the process of creating a new product?

into place with the aid of the following instructions:

...the more you know, the more you know...

move southward.

There is evidence that this condition existed before this accident occurred. On the night before the accident several automobiles were damaged by running into this torn up strip. As the automobile in question approached the excavation from the north, a street car was coming from the south; when the automobile was driven onto the excavation the driver lost control and it plunged across the street car track, smashing head-on into the approaching street car, inflicting the injuries of which plaintiff complains.

It is well established that a city must use reasonable care to keep its streets in a reasonably safe condition for the use of the traveling public. Purcell v. City of Chicago, 231 Ill. 164. The real point in controversy is whether this excavation in the street was protected by lights or barricades so that the traveling public could discover the danger in time to avoid it. The defendant introduced evidence that it had employed two watchmen to place barricades and lights along this street, and certain employees testified that they placed barricades at the north end of the cut with lanterns attached and burning. Although defendant's evidence tends to show the presence of barricades and lights at this point, yet there was ample evidence to the contrary. The motorman of the northbound street car says that he saw the automobile approaching the torn up part and that there were no lights or barricades at this point. Another witness, who was in an automobile about 200 feet behind the one involved in the accident, testified as to the absence of any barricades or lights. There were also a considerable number of witnesses who testified that there were not only no barricades or lights at this place at the time of the accident, but that there were none on the preceding evening; another witness testified that about two hours before the accident he drove into this excavation and there were no barricades or lights. There was an abundance of evidence from which the jury could properly conclude that there were no

barriades at this point, either on the night of the accident or of the morning of that day or of the evening before. The court very properly submitted this question to the jury.

There is no evidence that plaintiff was not in the exercise of ordinary care for his safety. He was sitting in the rear seat and it was reasonable to believe that he could not see the condition of the street until the automobile had entered upon the excavation strip. Something is said concerning the crowded condition of the back seat, but we cannot see that this would have any bearing upon the accident or plaintiff's exercise of care.

Defendant complains of the conduct of the attorney for plaintiff upon the trial of the case. It was developed by him that four of the occupants of the automobile were killed in this accident. It was argued that this fact was immaterial and the statement made for the purpose of inflaming the minds of the jurors. We do not agree with this. Plaintiff's counsel felt obliged to account for the failure to produce the occupants of the automobile as witnesses. The explanation that they had been killed was natural and proper. Furthermore, the death of other occupants of the automobile was an incident of the accident under consideration. We are of the opinion that all the facts occurring at the time were proper to present by evidence. In many cases similar evidence has been held admissible as tending to show all the facts surrounding the accident. West Chicago St. R. R. Co. v. Kennelly, 170 Ill. 508; Hoggs v. Iowa Central Ry. Co., 187 Ill. App. 621.

Plaintiff, under the statute requiring notice of accidents to be served upon municipalities, stated in his notice that he resided at 3817 W. 59th Place, Chicago, Illinois; no proof was offered upon the trial of such residence. Defendant argues strongly that this failure of proof is fatal to plaintiff, citing in support of this contention the case of Frey v. City of Chicago, 246 Ill.App.172. In that case there was a variance between the resident's address

reviewed at this point, under the name of the author as it
 the notion of that day or of the time of day. The word very
 properly qualified this word in the text.
 There is no evidence that anything was not in the course
 of writing for his work. He was sitting in the front of
 and it was possible to believe that he would not see the
 tion of the street until the automobile had moved upon the
 action step. Something is said concerning the driver's
 or the back seat, and he could not have seen any
 bearing upon the accident or anything's condition of
 defendant's position at the moment of the accident for
 plaintiff upon the trial of the case. It was stated by the
 that that of the defendant of the automobile was stated in this
 accident. It was stated that this was defendant's car
 statement made for the purpose of inferring the truth of the
 fact. He is not a witness in this case. Plaintiff's counsel
 obliged to answer the question as to whether the defendant of the
 automobile as witness. The statement that was made that
 was stated and proper. Furthermore, the fact of the
 of the automobile was not stated by the fact of the
 fact. He was of the opinion that all the facts necessary of the
 fact were stated as stated by evidence. In many cases where
 change has been held that it is not in fact all the facts
 surrounding the accident. See Wright v. W. J. Wright,
 170 Ill. 200; Wright v. W. J. Wright, 200 Ill. 200.
 Plaintiff, under the statute requiring written testimony
 to be sworn upon examination, stated by his counsel that the
 stated as 170 Ill. 200. Wright, 200 Ill. 200; Wright v. W. J. Wright,
 upon the trial of this case. Plaintiff's counsel stated that
 this fact as stated by the fact of the fact, stated in support of
 this case. See Wright v. W. J. Wright, 200 Ill. 200.

given in plaintiff's notice and the proof. This also was true of the physician's address. It was held, in effect, that under such circumstances the plaintiff must prove where he actually lived. In Mazzard v. City of Chicago, 259 Ill. App. 166, this court held it was not necessary that plaintiff prove by evidence on the trial matters contained in the notice as to the names and addresses of the parties therein named except if there was evidence offered tending to show that these addresses were not the real ones; that where there was no variance between the proof offered and the notice, it was unnecessary to prove the addresses. All the points made by counsel for the defendant upon this question were presented in Graham v. City of Chicago, 346 Ill. 638, where it was held that the statute does not require a plaintiff to furnish proof of every matter set out in the notice, and if there is nothing in the proof to contradict the recitals of the notice or if there is nothing to show that the recitals are untrue, there is no ground for a motion to dismiss. This is the last word of our Supreme court on this point.

There was sufficient proof that the notice was filed with the proper officers. The notice bears an endorsement indicating its receipt by the city clerk, corporation counsel and city attorney; also, upon the trial counsel for defendant admitted that it was served on the city attorney and filed with the city clerk.

It is argued that the amount of the verdict, \$20,000, is excessive. Plaintiff suffered a compound comminuted fracture of the tibia and fibula of the left leg, a compound fracture of the left femur, and a cerebral hemorrhage; he was unconscious in the hospital for two weeks; his wounds became badly infected and his left leg was amputated at the knee; nine operations were performed on him. His hospital, doctors' and nurses' bills aggregate about \$7,000. He was twenty-one years of age at the time of the accident and in good health. At the present time his general health is poor, and

...in ...
...the ...
...of ...
...in ...
...it was ...
...masters ...
...the ...
...feeling ...
...where ...
...notice ...
...made ...
...in ...
...the ...
...matter ...
...no ...
...show ...
...be ...
...these ...
...the ...
...except ...
...also ...
...served ...
...it ...
...exclusive ...
...thing ...
...them ...
...for ...
...was ...
...the ...
...it ...
...the ...

there is evidence that another operation will be necessary. We do not think the amount awarded him is excessive.

Defendant complains of instruction No. 16, given at plaintiff's request, as permitting the jury in assessing plaintiff's damages to take into consideration his mental suffering. Instructions containing the element of mental suffering have been approved in Klatz v. Pfeffer, 333 Ill. 90, and Chicago City Ry. Co. v. Anderson, 182 Ill. 298. We find no error in the instructions.

The evidence amply justified the verdict of the jury, and as there were no prejudicial errors upon the trial the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matlack, J., concur.

There is evidence that another investigation will be conducted. It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

It is not clear how the above evidence is to be used.

37476

ST. THERESA'S SOCIETY, GROUP NO. 29,
FREE POLISH WOMEN IN THE LAND OF
WASHINGTON, otherwise known as TOW.
SW. TERESY GRUPA 20, WOLNYCH POLEK
NA ZIEMI WASHINGTONA, a Corporation,
Appellee,

vs.

FRANCISZKA KASPERSKI, WALTER J.
CZMIELEWSKI and WALTER KASPERSKI,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

277 I.A. 619⁴

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Franciszka Kasperaki, one of the defendants, was cashier of the plaintiff organization; she gave bond, with the other defendants as sureties, for the faithful performance of her duties. This suit is on this bond, plaintiff claiming there was a shortage in her accounts, and upon trial had a verdict and judgment for \$600. Defendants appeal.

Were we inclined to be technical this judgment might well be affirmed because of the omission from defendants' abstract of record of many important matters. The abstract fails to show the character of the suit, the verdict, a motion for a new trial, the action of the court thereon, and a judgment; it is only an abstract of the evidence - nothing else. Chicago Record-Herald Co. v. Fred Bender & F. Co., 207 Ill. App. 152; Village of Winnetka v. McMartin, 351 Ill. 134.

Considering the appeal upon its merits we are of the opinion that plaintiff failed to prove any shortage or defalcation during the period of time covered by the bond, and also, that the weight of the evidence indicates that there was, in fact, no defalcation or shortage.

The surety bond recites the election of defendant Franciszka Kasperski as cashier of plaintiff on December 14, 1931, for a term

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.
 JOHN JOSEPH HARRIS, M.D.,
 VARIOUSLY ASSOCIATED WITH THE
 ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.
 ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

1747

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.
 JOHN JOSEPH HARRIS, M.D.,
 VARIOUSLY ASSOCIATED WITH THE
 ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.
 JOHN JOSEPH HARRIS, M.D.,
 VARIOUSLY ASSOCIATED WITH THE
 ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.
 ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.
 JOHN JOSEPH HARRIS, M.D.,
 VARIOUSLY ASSOCIATED WITH THE
 ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.
 ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.
 JOHN JOSEPH HARRIS, M.D.,
 VARIOUSLY ASSOCIATED WITH THE
 ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.
 ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

ST. JOSEPH'S HOSPITAL, NEW YORK, N. Y.

ending December 31, 1932; that she was "about to assume the duties of said office," and that if she should properly perform the duties of said office "during her term of office" and should truly account for all moneys and other things "coming to her hands as such cashier during her term of office," and at the conclusion of her term pay over to her successor all moneys and other things received by her as such cashier, and should, at the expiration of her term of office, or when requested, render a just and true account of her doings as cashier, then the obligation to be void, otherwise to remain in full force and effect.

Plaintiff says that a formal demand was made upon Mrs. Kasperski in August, 1934, after she had been removed from office and her successor elected, and that she failed to account in the sum of some \$600.

The evidence shows that the transaction which it is said produced the shortage occurred in March, 1933. The bond covers only moneys coming into the cashier's possession during the term of her office, which began December, 1931, ending December, 1932. It would not cover any transaction occurring prior to the term of office. A similar situation was involved in Myatic Workers of the World v. U. S. F. & G. Co., 152 Ill. App. 223, where it was held that if a defaulting officer misappropriated funds which came to him in his official capacity during a term of office when defendants were not his sureties, they were under no legal obligation to make good such defalcation. In Stern v. The People, 96 Ill. 475, it was said of a similar bond that the "obligation rested upon his sureties on his bond for the term in which the misappropriation occurred," and if the funds were misappropriated during a former term the sureties were not liable. So in the instant case the sureties, by the express terms of the bond, cannot be obligated to make good any shortage which occurred almost two years before they became sureties

We are also of the opinion that the evidence fails to show any misappropriation. Mrs. Kasperski testified that in March, 1930, she informed some of the members, apparently a committee of the plaintiff organization, that she had \$600 in cash in the treasury; that it was then agreed that she should purchase some interest bearing real estate bonds with this; she testified that she did so in the name of the Society and credited the interest collected on the bonds in the account books of the plaintiff; that she informed the Society of the purchase of the bonds in 1931 and that they were deposited in the bank. Apparently there was a default on the part of the mortgagor, for there is in evidence a certificate of deposit dated March 16, 1932, reciting the sale of these mortgage bonds by the Depositors State Bank and that they had been deposited with a bondholders committee, of which the Stock Yards Trust and Savings Bank was the depository; the certificate also recites that "Free Polish Women in the Land of Washington Group No. 20, Frances Kasperski, Treasurer, the holder hereof," has deposited said bonds, which are described as 1-\$500 and 1-\$100 First Mortgage real estate 6% bonds, secured on land and improvements at 7341-57 Yale Avenue, This instrument is signed by the Stock Yards Trust and Savings Bank, depository.

Although there is some dispute among the witnesses as to the treasurer's authority to make this investment, the greater weight indicates that the investment was authorized. In any event she properly accounted for what she had done with the money.

We also have noticed the evidence of Calak, the supervisor of the records of the Depositors State Bank, and his testimony that these records state that the bonds were purchased for Michael Kasperski and Franciszka Kasperski, his wife. There is no showing as to who made these entries, and in any event they would not prevail over the affirmative testimony that the bonds were purchased with

the money and for the benefit of the plaintiff and the certificate turned over to plaintiff.

We are of the opinion that the motion for a new trial, which appears in the record although not in the abstract, should have been allowed. For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, F. J., and Hatchett, J., concur.

These results are in line with the findings of the literature on the effects of the 1997-1998 Asian financial crisis on the growth of the Asian economies.

It is the opinion of the writer that the above information is correct and that the same should be used for the purpose of the report.

London, 11. April 1892

37519

JAMES A. FITZSIMMONS,
Appellant,

vs.

PEORIA CARTAGE CO., INC.,
a Corporation,
Appellee.

5 17
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

277 I.A. 619⁵

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

On the evening of January 8, 1930, plaintiff was riding as a passenger with two other persons in an automobile owned and driven by Lewis Snider. They were going in a southerly direction on State Route No. 4, a two-lane, 18 foot public highway in Will county, Illinois; the automobile ran into the rear end of the defendant's truck, which was moving in the same direction. Plaintiff received injuries and brought suit, alleging that at the time of the collision defendant's truck was standing on the highway, facing south, entirely obstructing the southbound lane of travel, and that it had no lights anywhere on the rear of the truck. Defendant contended that the truck was moving, going southward, with rear lights lighted; that its driver was entirely free from negligence and that the accident was caused by the carelessness of Snider in driving the automobile in which plaintiff was riding.

All the witnesses agree that it was a dark, stormy evening. Plaintiff and the three other men in the automobile testified to the effect that they first sighted the truck when 25 to 30 feet away; that they saw no light on the truck; that the rear end loomed up suddenly "like a gray colored wall." Snider attempted to turn toward the left but too late to avoid the collision, the right front end of the automobile striking the rear left end of the truck.

Everet Wilson, the driver of the truck, testified that he was going on a night trip from Chicago to Peoria, Illinois; that he had been engaged continuously as a truck driver for about 8½ years

277 I.A. 619

James A. Fitzpatrick
Attorney at Law
Florida Bar No. 1200
Tallahassee, Florida

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

On the evening of January 4, 1936, plaintiff was riding as a passenger with two other persons in an automobile owned and driven by Lewis Smith. They were going in a southerly direction on State Route No. 4, a two-lane, 14 foot wide highway in Will County, Illinois; the automobile ran into the rear end of the defendant's truck, which was moving in the same direction. Plaintiff still received injuries and shock at the time of the collision defendant's truck was standing on the highway, facing south, entirely obstructing the normal line of travel, and that it had no lights anywhere on the rear of the truck. Defendant contended that the truck was moving, going southward, with rear lights lighted; that the driver was actively free from negligence and that the accident was caused by the carelessness of Smith in driving the automobile in which plaintiff was riding. All the witnesses agree that it was a dark, stormy evening. Plaintiff and the three others in the automobile testified to the effect that they first noticed the truck when it was about 200 feet away; that they saw no light on the truck; that the rear end impacted on plaintiff's car like a heavy object. Plaintiff testified that he was going on a night trip from Chicago to Springfield, Illinois; that he had been engaged continuously as a truck driver for about 15 years.

before the trial and had worked for defendant for nearly two years before the accident; that he started out in the evening with a loaded truck, going southward; that as he approached Joliet large flakes of snow began to fall; that the severity of the storm increased and the precipitation changed from snow to rain and sleet which either froze on or adhered to the windshield, which condition prevented clear vision through the windshield and gave the roadway ahead a blurred aspect; he reached the town of Wilmington, where, as was his previous practice, he stopped for supper; he there attempted to clean the surface of the windshield which was completely covered with ice and sleet, using a putty knife to remove it; before resuming the journey southward he inspected his rear lights and found them all burning; the truck had three tail lights near the top and one tail light to the left and below the tail gate; all of these were electric lights.

Harold Martin was the manager of the restaurant where Wilson ate his supper and he corroborated Wilson's testimony as to the amount of ice on the windshield and his attempts to remove it. He also said he noticed that the lamps on the rear of the truck were all burning.

Wilson continued southward from Wilmington; the wind was increasing in velocity, the temperature was lower and the pavement was becoming slippery; ice commenced to accumulate on the windshield so that Wilson could not see through it at all; the windshield wiper was wholly ineffective and slid back and forth over the ice without dislodging any of it; Wilson then abandoned all effort to watch the road ahead by looking through the windshield, and lowered a window on the left side, through which he stuck his head to watch the roadway.

The accident happened about 3½ or 4 miles south of Wilmington; the roadway along this distance is straight, but about 300 feet

[illegible]

north of the place of the accident the roadway commences to rise; Wilson shifted the gears of his truck and drove up the hill in second speed, going from 12 to 15 miles an hour. Wilson says that the first he knew of the collision was when he heard the impact when the automobile in the rear struck the rear of his truck. Wilson stopped his truck and went to the rear and saw that the bracket holding the tail light had been broken off in the collision, but that the three red marker lights near the upper center part of the truck remained lighted. These upper lights are supplied from a separate circuit from the one lighting the tail light.

Lawrence West, a filling station attendant at Pontiac, saw defendant's truck at about 10:30 after the accident; Wilson had driven the truck into Pontiac without any change in the load or the rear lights. West described the appearance of the rear end of the truck, saying that the bracket of the tail light was broken; that one of the crates on the tailgate had been partially smashed and damaged and that the three marker lights were burning.

All of the witnesses for the plaintiff testified as to the weather conditions and in this respect corroborated the defendant. The windshield of their automobile was virtually covered with ice. They also stopped at Wilmington, where an attendant at a service station scraped the ice from the windshield with a metal tube and applied to the glass a liquid solution which it was thought would prevent the formation of ice. There is abundance of evidence in the record that such solution is ineffective for this purpose. There was an accumulation of ice on the windshield after the automobile left Wilmington. One witness riding in the automobile said he could not see through the windshield except at spots where the ice was broken off. The witnesses for plaintiff all seemed to agree that they could not see more than 25 to 30 feet ahead of the automobile and that just before the collision it was going at the rate of 20 to

north of the place of the collision. The roadway continued to rise; Wilson shifted the gears of his truck and drove up the hill in second gear, going from 15 to 18 miles an hour. Wilson says that the first he knew of the collision was when he heard the impact when the automobile in the rear struck the rear of his truck. Wilson stopped his truck and went to the rear and saw that the brackets holding the tail lights had been broken off in the collision, but that the lower and marker lights near the rear of the truck remained lighted. These rear lights are supplied from a separate circuit from the one lighting the tail light. Lawrence West, a killing station attendant at Lansing, saw defendant's truck at about 10:30 after the accident; Wilson had driven the truck into Lansing without any change in the load or the rear lights. West described the appearance of the rear end of the truck, saying that the bracket of the tail light was broken; that one of the circles on the tail light had been partially crushed and damaged and that the lower marker lights were burning. All of the witnesses who are mentioned testified as to the weather conditions and in this respect corroborated the defendant. The windshield of both automobiles was virtually covered with ice. They also stopped at the station, where an attendant at a service station sprayed the ice from the windshield with a metal tube and applied to the glass a liquid solution which it was thought would prevent the formation of ice. There is abundant evidence in the record that such solution is ineffective for this purpose. There was an accumulation of ice on the windshield after the automobile left Wilmington. The witness riding in the automobile said he could not see through the windshield except at spots where the ice was broken off. The witnesses for plaintiff all seemed to agree that they could not see more than 15 to 20 feet ahead of the automobile and that just before the collision it was going at the rate of 20 to

25 miles an hour.

The jury was fully justified in believing that the truck was moving with all four of its rear lights lighted; that the accident was caused by the weather conditions which obstructed the windshield of the following automobile so that it was impossible to see any distance ahead. If the driver of the defendant's truck was forced to abandon any attempt to see through the windshield in front of him and to watch the roadway in front through an open side window, it is reasonable to conclude that the same conditions obtained with reference to the windshield on the following automobile in which plaintiff was riding.

If the truck was moving forward at 12 to 15 miles an hour, with all four rear lights lighted, Wilson, its driver, was entirely free from negligence which proximately caused the accident. The jury could properly find these facts and that the speed at which the automobile was going, coupled with the fact of the slippery roadway and the opaqueness of the windshield, was the sole cause of the accident.

Plaintiff had just entered the employ of Snider as a civil engineer and was going with him to the place where Snider was erecting buildings for the State for the purpose of allowing plaintiff to familiarize himself with the work and the men employed. Based upon this, defendant moved the court to instruct the jury as a matter of law that plaintiff and his employer, Snider, and the defendant and its employees were, at the time of the accident, subject to the provisions of the Workmen's Compensation act. This motion was denied and this is assigned as error by the plaintiff, and both counsel present such argument. In view of the fact that the judgment acquits the defendant of any negligence and that we are affirming the judgment, we see no reason to pass upon the cross error of plaintiff in this respect.

Plaintiff challenges, with much detail, the giving of cer-

28 miles an hour.

The jury was fully justified in believing that the truck was moving with all four of its rear lights lit; that the accident was caused by the weather conditions which characterized the windshield of the defendant's car so that it was impossible to see any distance ahead. If the driver of the defendant's truck was forced to observe any object to see through the windshield in front of him and to reach the roadway in front through an open side window, it is reasonable to conclude that the same conditions obtained with reference to a windshield on the defendant's car while in which plaintiff was riding.

If the truck was moving forward it is to be miles an hour, with all four rear lights lit, and, the driver, was entirely free from negligence which proximately caused the accident. The jury could properly find these facts and that the speed at which the automobile was going, coupled with the fact of the slippery roadway and the darkness of the windshield, was the sole cause of the accident.

Plaintiff has failed to prove the injury of which he is a victim and was going with him in the truck where mother was exercising diligence for the purpose of allowing plaintiff to participate himself with the work and the non-employment. Upon this, defendant moves the court to instruct the jury as a matter of fact that plaintiff and his employer, mother, and the defendant and his employees were, at the time of the accident, not joined to the provisions of the Workmen's Compensation act. This motion was denied and his is sustained as error by the court and both counsel present were unanimous. In view of the fact that the defendant accepted the payment of any negligence and that we are affirming the judgment, we had no reason to give him the other error or complaint in this respect. Plaintiff complains, with much detail, the issue of car-

tain instructions at the request of the defendant. Defendant replies first that all of these instructions were agreed upon by counsel for both parties, hence plaintiff could not now be heard to object to them. The record shows that the instructions were submitted by both parties and discussed in the chambers of the trial Judge. It also shows that the counsel for plaintiff read the instructions proposed on behalf of defendant and made comments thereon. He said that he had no objection to many of them. As to others he said that while he did not like them the court may want to give them. We do not find that any instructions were given to which counsel for plaintiff at this conference made any serious objection. Having taken that position at the time, counsel should not now be heard to make objections which were not then presented. Where counsel induces the court or consents that it may give certain instructions, he is precluded from thereafter complaining of them. Pettit v. Weil-McLain Co., 252 Ill. App. 423.

However, considering the objections to the instructions made by plaintiff, we do not find anything therein which demands a reversal. A typical objection is that directed to defendant's instruction No. 14, which told the jury that plaintiff could not recover unless he proved that the negligence of defendant "was the proximate cause of the accident." Webster's dictionary is cited as giving the meaning of the word "the" as meaning one particular article from a class or number, and plaintiff argues that the use of the definite article "the" eliminates and excludes from the consideration of the jury any and all other causes. This objection is hypercritical. The use of the article "the" occurs in almost every instruction given on the subject of proximate cause. American Express Co. v. Risley, 179 Ill. 295; Walsh v. Chicago Railways Co., 294 Ill. 586. We note that in the conference in the Judge's chambers counsel for plaintiff's comment upon this instruction was, "I have no objection to that one -

tain instructions of the court in the following. Defendant's
 give their best and all of these instructions were given to the
 counsel for both parties, and defendant would not now be heard
 to object to them. The record shows that the instructions were
 submitted by both parties and discussed in the presence of the
 trial judge. It also shows that the counsel for plaintiff went
 the instructions proposed in regard to the matters and were
 thereon. He said that he had no objection to them at that time. He
 others as well that while he did not like some of them and may want
 to give them. He did not think that any instructions were given to
 which counsel for plaintiff at this conference with my services
 objection. Having taken that position at the time, counsel should
 not now be heard to make objections which were not then presented.
 There counsel instructs the court at various points it may give certain
 instructions, he is entitled to make whatever objection of them.

People v. Bell-McLean, 200 Ill. App. 423.

However, considering the objections to the instructions made
 by plaintiff, we do not find any error which amounts to a reversal.
 and. A typical objection is that directed to defendant's instruction
 no. 14, which says: "The jury shall find defendant guilty unless
 he proved that the defendant's statement was true and correct under
 of the accident." Defendant's instruction is also given the mean-
 ing of the word "yes" as meaning and defendant's instruction from a plain
 or number, and plaintiff argues that the use of the definite article
 "the" eliminates and excludes from the consideration of the jury any
 and all other causes. This objection is unavailing. The use of
 the article "the" occurs in almost every instruction given to the
 subject of possible causes. People v. Bell-McLean, 200 Ill. App. 423.
 Ill. 570; People v. Bell-McLean, 200 Ill. App. 423. We note that
 in the conference in the judge's chambers counsel for plaintiff's
 consent upon this instruction was, "I have no objection to that one -"

that is about the only instruction the defendant would be entitled to on negligence and contributory negligence."

To note and comment upon all of the objections to the rulings of the court upon the instructions would extend this opinion beyond a reasonable length. We have examined them and find no prejudicial error requiring a reversal.

Objection is made to the introduction in evidence of certain diagrams giving the figures and dimensions of certain crates on the rear of the truck. These diagrams are not found in the abstract. In Central Ill. Service Co. v. Beterding, 331 Ill. 277, it was held that a document which was questioned could not be discussed by the court for the reason that it was not included in the abstract.

The diagrams were properly admitted. A witness had testified to the measurements of the rear of the truck and the crates on the tail gate, and these diagrams simply present these by a drawing which would aid the jury in understanding the physical conditions. They were not posed photographs, which are condemned in the cases cited by plaintiff. They were correct representations in accordance with the figures and measurements given by the witness.

Objection is made to the testimony of the witness West on the ground that he described the condition of the rear end of the truck as he saw it some three or four hours after the accident. This fact, while lessening the weight of his testimony, would not make it incompetent. There is no evidence that Wilson stopped his truck at any time between the place of the accident and Pontiac, where West viewed the rear end of the truck. Under such circumstances his evidence was competent. In Black v. Harris, 200 Ill. 96, evidence as to the condition of an elevator and machinery about three-quarters of an hour after the accident was held

that it is not the only instance in which the defendant would be entitled to an acquittal and a retrial would be necessary.

It is not and cannot be said that the defendant is

entitled to an acquittal upon the introduction of evidence which is not relevant to the issues in the case. The law is settled that the defendant is not entitled to an acquittal upon the introduction of evidence which is not relevant to the issues in the case.

Objection is made to the introduction of evidence of the

fact that the defendant was in the room at the time of the

on the part of the State. The defendant is not entitled to an

acquittal. In United States v. Gurnea, 101 U.S. 379,

it was held that a defendant is not entitled to an acquittal upon the introduction of evidence which is not relevant to the issues in the case. The law is settled that the defendant is not entitled to an acquittal upon the introduction of evidence which is not relevant to the issues in the case.

The defendant is not entitled to an acquittal upon the

introduction of evidence which is not relevant to the issues in the case.

on the part of the State, and the defendant is not entitled to an

acquittal upon the introduction of evidence which is not relevant to the issues in the case.

Objection is made to the introduction of evidence of the

fact that the defendant was in the room at the time of the

on the part of the State. The defendant is not entitled to an

acquittal.

Objection is made to the introduction of evidence of the

fact that the defendant was in the room at the time of the

on the part of the State. The defendant is not entitled to an

acquittal upon the introduction of evidence which is not relevant to the issues in the case.

Objection is made to the introduction of evidence of the

fact that the defendant was in the room at the time of the

on the part of the State. The defendant is not entitled to an

acquittal upon the introduction of evidence which is not relevant to the issues in the case.

Objection is made to the introduction of evidence of the

fact that the defendant was in the room at the time of the

admissible, the court saying that evidence as to the conditions after the time of the accident would fairly tend "to prove its condition at the particular moment of the accident." The weight to be given it was for the jury. Other cases showing that circumstances after an event are competent to prove conditions at the time of the event, are C. & N. W. Ry. Co. v. Gillison, 173 Ill. 264; St. L. P. & N. Ry. Co. v. Dorsey, 189 Ill. 251; City of Chicago v. Jarvis, 226 Ill. 614.

Upon the evidence before it, the jury could properly return no other verdict than an acquittal of the defendant of the charge of negligence. Under such circumstances slight errors upon the trial will not require a reversal. We see no reason to disturb the judgment, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

admitted, the court said that evidence as to the condition
after the time of the accident would be "to prove the
condition of the defendant at the time of the accident." The weight
to be given it was for the jury. Other cases showing that cir-
cumstances after an event are relevant to the condition of the
time of the event, see W. H. W. v. W. H. W., 177 Ill.
384; W. H. W. v. W. H. W., 177 Ill. 381; W. H. W.
Chicago v. Jarvis, 228 Ill. 214.

Upon the evidence before it, the jury could properly
return no other verdict than an acquittal of the defendant of the
charge of negligence. Under such circumstances slight errors upon
the trial will not require a reversal. We see no reason to dis-
turb the judgment, and it is affirmed.

REVEREND.

O'Connor, J. 1. and Johnson, J. 2. dissent.

37540

ANTONETTE KOWALCZYK,
Appellee,

vs.

THE WESTERN AND SOUTHERN LIFE
INSURANCE COMPANY, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

277 I.A. 620

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$690 in a suit brought on two industrial insurance policies. The trial court struck defendant's affidavit of merits and entered judgment as on default.

Plaintiff is the niece of the insured and defendant asserts that as the policies by their terms are payable to the executor or administrator of the insured upon his death, only such a representative may bring suit.

The policies provide that upon proof of the death of the insured the defendant company would pay the insurance "to the executors or administrators of the insured unless payment be made under the next succeeding provision." Following this is what is known as the facility of payment clause, which provides that the company may make payment to any relative by blood of the insured, or connection by marriage, or to any person appearing to the company to be equitably entitled thereto. A rider was attached to the policies, signed by the insured, authorizing the company to pay the amount of insurance due under the policy to Antonette Kowalczyk, niece; this authorization was not to vary or alter the terms and conditions contained in the policy.

Plaintiff claims that under this authorization defendant was obligated to pay the amount due under the policies to her.

The effect of such an authorization was considered in McDaniels v. W. & S. Life Ins. Co., (the same defendant as here) 332 Ill. 603. There the insured authorized the company to pay the

RECEIVED BY THE DIRECTOR

10-10-40

THE DIRECTOR AND ASSISTANT DIRECTOR
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C.

ST. LOUIS, MO.

TO THE DIRECTOR AND ASSISTANT DIRECTOR

Reference is made to your letter of October 10, 1940, regarding the activities of the Industrial Union of Marine and Shipbuilding Workers of America, hereinafter referred to as the IUMSWA, in connection with the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area.

The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area.

The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area.

The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area. The IUMSWA is a labor union which is active in the St. Louis area and is engaged in the activities of the IUMSWA in the St. Louis area.

insurance in the policy to his niece. It was held that this was not an assignment of the benefits of the policy to her and was not sufficient to create a liability on the part of the insurer to pay the proceeds of the policy to her; that it was merely an option which the insurer could exercise if it saw fit to do so, and that only the personal representative was entitled to sue on the policy.

The facts in the instant case are precisely like those in the case cited and our conclusion must be controlled by what is said in the opinion in that case.

Plaintiff does not appear in this court to support her judgment.

As the case was tried by the court the judgment will be reversed without remanding.

REVERSED.

O'Connor, P. J., and Matchett, J., concur.

37566

LOUIS FISHMAN,
Appellee.

vs.

WILLIAM MEYERING, Sheriff,
JOHN DAHMEKE et al.,
Appellants.

53
APPEAL FROM COUNTY COURT
OF COOK COUNTY.

277 I.A. 620²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the County court entered in a proceeding under the Insolvent Debtors act, chap. 72, Illinois Statutes, releasing Louis Fishman, the petitioner, from arrest and imprisonment and from a capias ad satisfaciendum. The respondents make various points, but as there is no bill of exceptions or certificate of evidence before us we cannot consider them. The order entered by the County court judge provided for a bill of exceptions in sixty days, but none was signed or filed. There is properly in the record before us only the petition and the court's order.

There is some argument as to whether the new Civil Practice act of 1933 governs this appeal or whether the Insolvent Debtors act should control. It is not necessary to decide this question for each of these acts requires a certificate of the trial judge as to the matters presented before him.

There is included in the record before us the declaration, pleas, instructions, and the judgment order of the Superior court. It is said these were offered as exhibits in the hearing in the County court, but such exhibits are not properly a part of the record unless incorporated in the bill of exceptions or record of the proceedings certified to by the judge. As we have said, this leaves in the record proper only the petition and the court's order of discharge. We therefore cannot say that the order of the County court discharging the petitioner was erroneous, and it is affirmed. McCarthy v. The People, 183 Ill. App. 321.

ORDER AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

1975

1975

1975

1975

1975

1975

1975

1975

1975

1975

1975

1975

1975

37363

ALLAN NELSON LINE,
Appellee,

vs.

A CENTURY OF PROGRESS, Inc.,
Appellant.

54
Filed November 5, 1934.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

277 I.A. 620³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In June, 1932, defendant was conducting on the lake front in Chicago an enterprise in the nature of an exposition or World's Fair under the name of A Century of Progress, Inc. The land occupied extended from 12th to 39th street. Only part of the buildings on the grounds had been completed. The exposition was not fully under way, but defendant had erected gates of entrance at convenient places where an admission fee was charged to the general public.

Plaintiff, a student at Northwestern University, was 21 years of age. He applied to defendant for work and on June 11th was employed by it and assigned to duties as a ticket taker or guard at one of the gates.

About four months prior to this time defendant purchased from the Lake Erie Chemical Co. a number of instruments described as gas guns, one of which is attached to the record. The instrument is about ten inches long, with a diameter which varies from about an inch at one end to an inch and a half at the other. On the smaller end is a knob, to which is attached small leather thongs. The instrument is of a reddish brown mahogany color and made of a composition which gives it the appearance of wood. It much resembles a policeman's billy. On one side of it is a trigger in appearance quite similar to the lever usually found on fountain pens by which the pen is filled. Within the body of the instrument is a receptacle which when the instrument is in use is filled with a chemical known as tear gas. By the movement of the trigger the gas can be discharged

Filed November 5, 1934.

27532

WILLIAM WILSON LEE,

Respondent,

vs.

A CERTAIN TRUSTEES, INC.,

Appellant.

IN THE DISTRICT COURT

OF COOK COUNTY,

Case No. 27532

BEFORE THE COURT AT CHICAGO, ILLINOIS.

In June, 1934, respondent was contacted at the last time in Chicago as respondent in the matter of an application for relief from the same of a company of trustees, Inc. The last so-called extended from him to this office, only one of the bills on the grounds had been received. The application was not fully under way, but respondent had received notice of evidence at respondent's place where an application for was made to the court public.

Respondent, a resident of Northwestern University, was 21 years of age. He applied to respondent for work and on June 15th was employed by it and assigned to duties as a student leader in board at one of the cases.

About two months prior to this respondent returned from the Lake Erie Chemical Co., a number of instruments described as gas guns, one of which is attached to this report. The instrument is about two inches long, with a diameter which varies from about an inch at one end to one inch and a half at the other. The instrument is a tube, to which is attached small leather bag. The instrument is of a yellowish brown, mottled color and made of a material which gives it the appearance of wood. It is made of two pieces of metal, one of which is in a U-shape in appearance. The other is a gas gun. It is never used as a gas gun, but is used as a tool. The gun is filled. Inside the body of the instrument is a trigger. When the instrument is in use it is filled with a material which is gas. By the movement of the trigger the gas can be discharged.

at a distance of about 75 feet. Viewed as a whole the instrument has nothing about it from which one not familiar with it would suppose it was a firearm. On the contrary, such an inspection would tend to produce the impression that it was a combination billy and flash light. There is nothing on it which would indicate any dangerous chemical within, or that the instrument is in any other way dangerous.

Defendant possessed and used a small Chevrolet truck, the body of which was closed; in the back part of it were chemical tanks containing a liquid used in extinguishing fires. There were glass doors on each side of the cab of the truck, and the truck was used to patrol the Fair grounds throughout the night. One of these gas guns was placed in a bracket just above the middle of the windshield of the truck.

It was the custom each morning to use this truck for the purpose of carrying employees who worked as guards or ticket takers from the head office in the Administration building, where the employees were to report to the various gates where their services were to be performed. The drivers in charge of the truck (this duty having been performed by them as instructed) would then put the truck away, first removing the gas gun from its bracket, then unloading and placing it in the drawer of a desk in the office of the Administration building.

Defendant had knowledge of the dangerous character of this device. An agent of the manufacturer testified that it was dangerous to put the instrument in the hands of persons not familiar with it and that it was necessary to instruct those using it as to the dangers attendant upon such use. Printed instructions to this effect were sent to defendant when the gas guns were sold to it by the manufacturer. The agent further testified that defendant was cautioned that the user of one of these guns should be as careful in using it

at a distance of about 75 feet. Viewed as a whole the instrument has nothing about it from which one can tell whether it would give a false or a true reading. On the contrary, when an inspection would tend to produce the impression that it was a trustworthy bill and that it was a five-cent bill. There is nothing on it which would indicate any danger-ous character, or that the instrument is in any other way dangerous.

Detachment proceeded and used a small Chevrolet truck, the body of which was closed; in the back part of it were several seats arranged in a row. In the front of the truck, and the driver was seated to patrol the two grounds throughout the night. One of these was then was placed in a position just above the middle of the windshield of the truck.

It was the custom when coming to see this place for the purpose of carrying out the work of the detachment, that the men from the post office in the station building, where the employees were to report in the morning, were their employees were to be notified. The driver in charge of the truck (this duty having been assigned to him as indicated) would then see the truck away, first removing the car from the street, and returning and of course in the driver of a truck in the office of the administration building.

Detachment had knowledge of the dangerous character of this device. In regard of the instrument, however, that it was dangerous to use the instrument in the hands of persons not familiar with it and that it was necessary to instruct those using it as to the danger-ous character of the instrument. It is not possible to say that the instrument was dangerous, but it is not possible to say that it was not dangerous. The danger of the instrument was not in the instrument itself, but in the hands of the person using it. The danger of the instrument was not in the instrument itself, but in the hands of the person using it. The danger of the instrument was not in the instrument itself, but in the hands of the person using it.

as he would be with any gun or firearm; that it should never be discharged in a person's face nor left where careless or irresponsible people might get hold of it.

After these gas guns were received by defendant, all of the guards and building superintendents then employed by defendant were called together and instructed as to the use of these instruments. Plaintiff had not at that time been employed there. He did not receive any instruction, and after his employment he was never instructed as to how to use the gas gun nor warned of the dangers incident to its use.

On the morning of June 15, 1932, defendant's patrol truck was in charge of two employees named Gloster and Tveter. Having patrolled the grounds throughout the night they drove the truck to the Administration building in the early morning for the usual purpose. On the day before plaintiff had been directed to report for work at 6:30 a. m. on the next day, and he arrived at the Administration building a little before that time. The empty truck was then standing in front of the building. Plaintiff went to a dressing room used by the guards and came out of the building with another guard named Lewis. On the previous day plaintiff had been taken to his post of duty by this same truck. He knew it was used as a fire patrol. He walked over to it, opened the left hand door and slid behind the steering wheel into the middle of the seat. Lewis stood outside with one foot on the left running board.

Plaintiff noticed the gas gun in the bracket and moved, as he says, by curiosity, reached up and took it down, asking Lewis what he supposed it was. Lewis said it might be a combination billy and time clock, but plaintiff says that he himself supposed it was a flash light. He looked down the muzzle and noticed a black shiny substance in the barrel; he turned the gas gun over in his hands, and as the muzzle came in direct line with his face it was discharged.

as he would be with my gun or I would; that it should never be
discharged in a person's face nor left where someone might use it
the people at the time of it.

After these two were received by defendant, all of the
guards and building superintendent were engaged by defendant were
called together and instructed as to the use of these instruments.
Plaintiff did not at that time been engaged there. He did not
receive any instruction, and after his employment he has never
instructed as to how to use the gun or in the use of the guards
incident to the one.

On the morning of June 12, 1932, defendant's patrol truck
was in charge of two employees named Oliver and Foster. Having
patrolled the grounds throughout the night they drove the truck to the
administration building in the early morning for the usual purpose.
On the day before plaintiff had been directed to patrol for work at
8:30 a.m. on the same day, and he arrived at the administration
building a little before that time. The patrol truck was then about
one-third of the building. Plaintiff went to a dressing room
used by the guards and came out of the building with another guard
named Davis. On the previous day plaintiff had been taken to his
post of duty by this same truck. He knew it was used as a
patrol. He walked over to it, opened the left door and with
behind the steering wheel took the wheel of the truck. Davis stood
outside with one foot on the left running board.

Plaintiff noticed the two men in the truck and waved, and
he waved by himself, removed my gun from its cover, taking Davis
along in response to my wave. Davis said it might be a combination rifle
and time clock. But plaintiff says that he did not suspect it was
a clock rifle. He looked down the muzzle and noticed a black mark
situated in the barrel; he turned the gun and over in his hands,
and as the muzzle came in direct line with his face he was alarmed.

Plaintiff says he did not pull the trigger, but the evidence indicates either a stiff pull or a very forceful blow at the end was the only way by which a discharge of it could have been brought about. The probability is that consciously or unconsciously plaintiff applied the force which caused the discharge. The consequences were deplorable. Cuts on the lip, over the eye and through the nose were wounds that healed, but his eyes were ruined. One eyeball had to be removed and a glass one substituted; the other eye was injured to such an extent that plaintiff can recognize persons only with difficulty, and he is able to read only large block print of the size of about two inches high.

Defendant is a corporation whose business it is stipulated is such as to bring it within the provisions of the Workmen's Compensation act, and the parties were operating under that act the day the accident occurred.

Plaintiff filed a declaration in four counts, two of which charged that defendant was guilty of wanton and wilful negligence. The other counts charged simple negligence by the failure of defendant to instruct or warn and by leaving the dangerous instrument in an exposed and unprotected place. In some of the counts there was an allegation of the failure to provide a safe place for plaintiff to work, inconsistent, we think, with the averments that the injuries plaintiff received did not arise out of and in the course of his employment. Motions of defendant at the close of all the evidence to exclude counts which charged wilfulness and wantonness were denied, as was a general motion to instruct the jury to find defendant not guilty. The jury at the request of plaintiff was instructed on the theory that there was evidence from which it might infer wilful and wanton negligence. The cause was submitted to the jury which returned a verdict for plaintiff in the sum of \$75,000, upon which the court, overruling motions for a new trial

The defendant says he did not call for the witness, but the witness
 indicates either a will or a very important one as the one
 was the only way by which a change of it could have been brought
 about. The probability is that something of an unconscious
 plaintiff against the law which governs the situation. The same
 reason were demonstrable. But as we find, even as we find, the
 the more we would not need, but all of us were needed, the
 equally had to be proved and a fact not established; the other
 you was intended to show in detail that plaintiff was responsible
 various with difficulty, but he is not to read only large
 black print of the time of about the same date.
 Plaintiff is a corporation whose business it is to
 in such as to bring it into the possession of the defendant's
 corporation and, the defendant were existing under that act
 the act the defendant committed.
 Plaintiff filed a declaration in four counts, two of which
 charged that defendant was guilty of violation of certain provisions.
 The first counts charged that defendant was guilty of violation of the
 defendant to himself or was not by having the defendant in the
 in an exposed and unprotected place, as seen in the counts above
 was an allegation of the failure to provide a safe place for plain-
 tiff to work, in violation, as stated, of the provisions that the
 injuries plaintiff received his was not out of the line of his
 of his employment. The defendant is not liable for all the
 evidence to establish that plaintiff was injured and damages
 were denied, as was a general finding in violation of the law.
 defendant not guilty. The jury in the second of counts was in-
 structed on the theory that there was evidence to establish it was
 later with and certain negligence. The count was rejected by
 the jury which returned a verdict for plaintiff in the sum of
 \$75,000, from which the court, overruling motions for a new trial

and in arrest, entered judgment.

It is argued for reversal that the verdict is against the manifest weight of the evidence; that the damages are excessive; that the court erred in the giving and refusing of instructions; that interrogatories requested by defendant were improperly refused; that the allegations of the declaration are insufficient to support the verdict; that the alleged negligence of defendant was not the proximate cause of plaintiff's injury, and that plaintiff was guilty of contributory negligence.

It is said in the first place that there is no evidence in the record from which the jury could reasonably find defendant liable under those counts which alleged that the negligence of defendant was wilful and wanton. An examination of the evidence persuades us that this contention must be sustained.

Plaintiff has cited numerous cases tending to sustain the theory upon which he sues, but it does not appear that the question of whether the supposed negligence was wilful or wanton was considered or involved in any one of them.

Courts of this State have held that counts which charge wilful and wanton conduct are different in their nature from counts which charge only inadvertence or general negligence. In the case of Hoeks v. O'Donnell, 260 Ill. App. 544, this court held, citing authorities, that it was error to instruct the jury upon the theory that the evidence tended to sustain a charge of wilfulness and wantonness when there was no evidence in the case on which to base such an instruction. In Price v. Bailey, 265 Ill. App. 358, we held that where there were several counts, some of which charged ordinary negligence and others wilful and wanton negligence, the general verdict in favor of plaintiff would be sustained, although there was no evidence to support the wilful and wanton counts, but that it was error to submit a special interrogatory as to whether

the negligence of defendant was wilful and wanton without also giving an instruction which explained the difference between general negligence and negligence which is wilful and wanton. As the Supreme court pointed out in Walldren v. Krug, 291 Ill. 472, it is difficult to accurately define the distinction between general negligence and negligence which may be properly designated as wilful and wanton; but the cases seem to agree that wilful or wanton negligence must be negligence so gross in its nature as to amount to recklessness. We hold that the facts as heretofore stated fail to disclose conduct on the part of defendant which may be so designated. We therefore conclude that the counts which charged that the negligence of defendant was wilful and wanton should have been excluded from the jury, and that it was error for the trial court to deny the motions of defendant to exclude them.

Defendant, however, further contends that there was no evidence from which it could be found guilty under the counts which charged general negligence. The theory of defendant appears to be that plaintiff was a trespasser at the time he received his injury, and that it owed him no duty except that it would not wilfully or wantonly injure him. Defendant further contends that when plaintiff took down the gas gun from the bracket in which it was placed, his act in that regard was a trespass and for that reason also he must be held to be a trespasser, and that the rule applicable to trespassers applies. To this point defendant cites a number of cases, such as Chicago Title & Trust Co. v. Core, 223 Ill. 58; Fredericks v. E. & N. Ry. Co., 96 Neb. 27; Halbrook v. Aldrich, 167 Mass. 872; Mangan v. Atterton, L. R. 1 Exch. 239; Hughes v. Pacific, 2 Hurl. & C. 744. This contention, we think, disregards the theory upon which plaintiff's suit is based, that is, that the gas gun was an instrument inherently dangerous and deceptive in appearance; that defendant adopted and made use of it and was therefore bound

to use a degree of care commensurate with the danger and that such care required defendant, under the circumstances, to warn plaintiff of the dangerous character of the gas gun or to instruct him with reference thereto or to place it where it was not easily accessible. Plaintiff says that the case presents the single issue of whether a person is justified in leaving an instrument so dangerous in character as this one where an innocent person might be injured by it, and he cites numerous cases illustrative of this theory, such as Commonwealth Electric Co. v. Melville, 210 Ill. 70.

The cases on which defendant relies were brought on a different theory. We shall not review them at length, but point out that Mangan v. Atterton, so far as the decision was based on the theory that plaintiff was a trespasser, was severely criticized in the later case of Clark v. Chambers, 3 Q. B. 327, and that the tendency of the later decisions is to recognize reasonable exceptions to the general rule that limits the right of a plaintiff trespasser to recovery only for wilful and wanton injury. Hynes v. N. Y. C. R. R. Co., 231 N. Y. 229; Mourton v. Polter, 2 K. B. 183.

However, we are of the opinion that plaintiff did not become a technical trespasser by taking the gas gun into his own hands. He was in the truck by invitation and direction of defendant. He was making use of a means of transportation provided by it. Defendant voluntarily assumed the task of conveying plaintiff to the place of his employment and therefore was obligated to use reasonable care to the end that he might be safely carried to that place. That was the minimum duty and obligation the law imposed upon defendant under the circumstances. Milauskis v. Terminal R. R. Assoc., 286 Ill. 547; Roberts v. C. C. C. & St. L. Ry. Co., 279 Ill. 493. The cases upon which defendant relies, such as Gibson v. Leonard, 143 Ill. 182, and Darsch v. Brown, 332 Ill. 592, are not applicable.

We think the jury might reasonably find that plaintiff was not

a trespasser and that defendant was negligent. There was nothing about the instrument which would in any way indicate that it contained any explosive or any substance in any way inherently dangerous. On the contrary, the construction of the instrument concealed (and undoubtedly was intended to conceal) the facts in that regard. The cartridge which contained fulminate of mercury cap and powder was hidden within the instrument. The hammer or trigger, as it was called, would not indicate to any one who had not been warned or instructed an instrument any more dangerous than a fountain pen. In short, the construction of the instrument was thoroughly deceptive. Viewed solely from the exterior it seemed to be a policeman's club. To one looking down into the cylinder it had the appearance of a flashlight. This deceptive and dangerous instrument was placed within easy access of plaintiff without warning or instruction as to its dangerous character. This was no doubt inadvertence, but inadvertence which a jury could reasonably find to be negligence since the injury to plaintiff could have been foreseen as probable.

Defendant further contends that even if it was negligent, the negligence was not the proximate cause of the injury plaintiff sustained. It is urged that the act of plaintiff in picking up the gas gun broke the causal connection between the alleged negligence of defendant, and that it is therefore impossible to hold that the neglect of defendant to protect, instruct and warn was the proximate cause of the injuries plaintiff sustained. That contention disregards the essential character of the negligence alleged of which we have already seen there was evidence tending to prove. The failure of defendant to protect, warn or instruct was not a remote cause of the discharge of the gas gun. It was not a separate and efficient intervening cause at all. On the contrary, it was a continuing negligence which began with the failure to instruct, warn or protect and continued up to the time of the accident.

a taxpayer and that defendant was negligent. There was nothing about the instrument which would in any way indicate that it should be examined or any indication as to why not. Defendant's negligence, on the contrary, the negligence of the instrument was not (and negligently was limited to general) the facts in this regard. The evidence which concerned defendant's negligence and the question was raised within the instrument. The question is, however, as to whether, would not indicate to any one who had not been warned or instructed as to the instrument and the facts in this regard. In short, the negligence of the instrument was negligently negligent. What is said in the instrument is assumed to be a defendant's duty. The one looking down into the cylinder is not the defendant of a plaintiff. This negligence and defendant's negligence was placed within each case of liability although dealing or investigation as to the negligence. This was no fault in negligence, but in negligence. A jury would reasonably find to be negligent. The injury to of liability could have been foreseen as probable. Defendant's negligence was not even if it was negligent, the negligence was not the negligent cause of the injury. Plaintiff's negligence, it is said, that act of liability is placed by the fact that the causal connection between the alleged negligence of defendant, and that it is defendant's negligence to say that the neglect of defendant is negligent. Plaintiff's negligence was the negligent cause of the injury. Plaintiff's negligence, that connection of negligence, the negligent negligence of the negligence alleged of which to have already been found to be negligent. The failure of defendant to protect, was it negligent to say a remote cause of the negligence of the defendant. It was not a negligent and negligent negligence cause of all, on the contrary, it was a negligent negligence which began with the failure to protect, that of which was concerned as to the time of the negligence.

It was a part therefore of that transaction and constituted at least one of the efficient causes of it. In I. C. R. R. Co. v. Siler, 229 Ill. 390, our Supreme court said:

"The rule as to what constitutes proximate cause was considered in the case of Atchison, Topeka and Santa Fe Railroad Co. v. Stanford, 12 Kan. 354, and it was said: 'Any number of causes and effects may intervene between the first wrongful cause and final injurious consequence, and if they are such as might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered, in law, as the proximate result of the first wrong cause.'"

To the same effect are Memphis Consolidated Gas & Elec. Co. v. Creighton, 183 Fed. 552; Miller v. Union Pac. R. R. Co., 78 Law Ed. 147.

Again, defendant contends that plaintiff is precluded from recovering by reason of contributory negligence as a matter of law. We are not unaware that the law in this State requires affirmative proof of due care in order that plaintiff may recover in an action of this character, but whether we regard the principle upon which the rule as to contributory negligence is based as proximity of legal causation, absence of the right of indemnity or contribution between joint tortfeasors, or voluntary assumption of risk (See Bohlen's Studies in the Law of Tort, chap. 9, p. 501) we think it must be held under the facts which here appear that the question of whether plaintiff exercised that degree of care which entitled him to a verdict, was for the jury. The question of proximate cause we have already discussed. The nature of the negligence alleged precludes the idea that the parties were in any sense joint tortfeasors. We have already called attention to the fact that the instrumentality was so deceptive in appearance (in the absence of warning or instruction) as to preclude the idea that plaintiff voluntarily assumed the risk. He could not voluntarily assume a danger of which he had no knowledge. These considerations apply, we think, not only to the picking up of the

gas gun but also to the manipulation of the trigger, on which question there is a conflict in the evidence. Therefore, the question of whether plaintiff's alleged negligence was the proximate cause of his injuries and the question of whether plaintiff was guilty of contributory negligence, should have been submitted by the court to the jury under proper instructions as to the law.

Defendant also argues that plaintiff cannot recover because he is barred from maintaining his action under section 6 of the Workmen's Compensation act. Cahill's Ill. Rev. Stats. 1933, chap. 48, par. 206, sec. 6. That section provides that subject to certain provisions, "no common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act ***." Plaintiff's declaration alleges specifically that the injury he received did not arise out of and in the course of his employment. It was stipulated that defendant was operating under and governed by the provisions of the Workmen's Compensation act. Defendant avers its belief that the allegation of the declaration that the injuries to plaintiff did not arise out of and in the course of the employment is sustained by the evidence. However, defendant argues that although the accident did not arise out of and in the course of employment, if any of the relations incident to the relationship of master and servant are applicable, plaintiff was "engaged in the line of his duty" and that in such a situation no common law right of action would be available. Defendant further argues that it was not the legislative intent to limit and restrict the bar of the statute to such accidents as arose under circumstances where compensation was payable under the act. It says that if this had been the intention, the legislature would have said so, as in section 29 of the act

where a right of action against third persons other than the employers is preserved; that the phrase "in the line of his duty" must be interpreted as meaning broadly any situation where an employee on his employer's premises is in general pursuing his duties, even though at that moment stepping aside from them and even though the accident did not arise out of or in the course of his employment. Defendant urges this as a reasonable construction, because, it says, the legislature knew that the employer would insure, and the theory of the act was that without regard to the question of fault, industry should bear the cost of accidents which occurred in industrial operations.

The argument is ingenious but not convincing. We are wholly unable to agree with such interpretation, which is inconsistent with the manifest purpose of the act as expressed in the language used. Nowhere is there indicated legislative intention to create a class who would be deprived of common law and statutory rights without receiving benefits conferred by the statutes. The interpretation for which defendant contends would be discriminatory in its nature and manifestly unjust to persons thus deprived of their fundamental right of access to the courts for redress of their wrongs.

Moreover, the construction wholly disregards, as it seems to us, the express language of this particular section. The section specifically limits the class of persons who by reason of being in their line of duty are deprived of rights to maintain suits at law to such as are "covered by the provisions of this act." The interpretation for which defendant contends must therefore be rejected.

Whether the injury plaintiff received was one for which compensation was payable under the act may possibly be a close question. Plaintiff expressly disclaims such benefit, and defendant avers its own belief that plaintiff was not entitled to such compensation. We are reluctant to decide a case upon a theory expressly disclaimed

by one of the parties and disowned by the other.

Moreover, plaintiff cites a large number of cases decided by the Supreme court of this State holding, as he argues, that an employee is not in the course of his employment, even though he may be in the general area of it, if he is not at the time engaged in the particular duty for which he was employed. The cases cited are Deitzen Co. v. Industrial Board, 279 Ill. 12; Adams & Westlake Co. v. Industrial Comm., 292 Ill. 590; Henry v. Industrial Comm., 293 Ill. 491; Lutheran Hospital v. Industrial Comm., 342 Ill. 325; Herald Printing Co. v. Industrial Comm., 345 Ill. 25; Great Atlantic & Pacific Tea Co. v. Industrial Comm., 347 Ill. 596; Edmonds v. Industrial Comm., 350 Ill. 197. Defendant has not undertaken to analyze or distinguish these cases, and we shall not undertake to do so.

We do not rest our decision that this case should go to the jury upon the theory that defendant neglected duties growing out of the particular relationship of master and servant. Defendant may not have been obligated to furnish plaintiff a safe place to work when he was not yet working, but as defendant undertook to carry plaintiff to his work it was obligated to furnish him a reasonably safe place in which to ride. We hold that the jury might reasonably find that defendant was liable by reason of its possession and use of an instrument which it knew to be dangerous without using proper precautions to prevent injury to third persons who defendant knew might be brought into contact with it. The duties of defendant were not alone to persons with whom it stood in the relationship of master and servant, but to any person who it might have reason to believe might be injured through contact with this dangerous instrumentality. Well considered decisions of the courts of this and other states sustain this theory. Sometimes the theory is applied where liability might be grounded on the doctrine of attractive nuisance, as in Stedwell v. City of Chicago, 297 Ill. 486, but it

is also applied in cases where the attractive nuisance doctrine is not applicable. Moore v. Wabash Ry., 299 Ill. 596. This court applied the theory in Hunyan v. American Glycerin Co., 230 Ill. App. 351, where a can of nitro-glycerin exploded. In Commonwealth Electric Co. v. Melville, 210 Ill., 70, the dangerous instrumentality was a highly charged electric wire; in Moore v. Wabash Ry., *supra*, a percussion cap, in Cincinnati, New Orleans & Texas R. Co. v. Padgett, 159 Ky. 361, a stick of dynamite embedded in a pail of pitch, in Hurry Chevrolet Co. v. Cotton, 169 Miss. 521, a gasoline blow torch, in Makins v. Piggett & Inglis, 89 Canada Supreme Court, 188, explosive detonators. Other cases might be cited, but what we have already said is sufficient to indicate our opinion that plaintiff is entitled to have his case submitted to a jury under the counts charging general negligence.

Defendant has argued quite at length numerous objections to a large number of instructions given at the request of plaintiff and to the refusal of the court to give instructions requested by defendant. It is quite unnecessary to consider all the complaints argued in this respect. Plaintiff's instruction No. 12, which undertook to tell the jury of the law as to the determination of the preponderance of the evidence and assumed to enumerate the elements to be considered in such determination, neglected to include the important element of the number of witnesses. This was erroneous, (Chicago Union Traction Co. v. Hampe, 228 Ill. 346; Roone v. Olchy, 297 Ill. 166) although not always reversibly so. (M. J. & E. Ry. Co. v. Lawler, 239 Ill. 621; Walters v. Checker Taxi Co., 265 Ill. App. 329.) For the errors already indicated the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., concurs.

McSurely, J., specially concurring: I concur in the conclusion but not in all that is said in this opinion.

is also applied in cases where the witness is not a party to the case.

Section 10 of the Evidence Act, 1911, provides that:

"10. Where a case is tried by a judge alone, the judge may, if he thinks fit, call for evidence from any person who is not a party to the case."

This section is applicable to cases where the judge is not a party to the case.

It is a general principle of law that a person who is not a party to a case may be called upon to give evidence.

A person who is not a party to a case may be called upon to give evidence.

Section 10 of the Evidence Act, 1911, provides that:

"10. Where a case is tried by a judge alone, the judge may, if he thinks fit, call for evidence from any person who is not a party to the case."

This section is applicable to cases where the judge is not a party to the case.

It is a general principle of law that a person who is not a party to a case may be called upon to give evidence.

A person who is not a party to a case may be called upon to give evidence.

Section 10 of the Evidence Act, 1911, provides that:

"10. Where a case is tried by a judge alone, the judge may, if he thinks fit, call for evidence from any person who is not a party to the case."

This section is applicable to cases where the judge is not a party to the case.

It is a general principle of law that a person who is not a party to a case may be called upon to give evidence.

A person who is not a party to a case may be called upon to give evidence.

Section 10 of the Evidence Act, 1911, provides that:

"10. Where a case is tried by a judge alone, the judge may, if he thinks fit, call for evidence from any person who is not a party to the case."

This section is applicable to cases where the judge is not a party to the case.

It is a general principle of law that a person who is not a party to a case may be called upon to give evidence.

A person who is not a party to a case may be called upon to give evidence.

Section 10 of the Evidence Act, 1911, provides that:

"10. Where a case is tried by a judge alone, the judge may, if he thinks fit, call for evidence from any person who is not a party to the case."

This section is applicable to cases where the judge is not a party to the case.

It is a general principle of law that a person who is not a party to a case may be called upon to give evidence.

A person who is not a party to a case may be called upon to give evidence.

Section 10 of the Evidence Act, 1911, provides that:

"10. Where a case is tried by a judge alone, the judge may, if he thinks fit, call for evidence from any person who is not a party to the case."

37473

VIOLET EREY,
Appellee,

vs.

THOMAS M. WHITSON,
Appellant.

55-77
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

277 I.A. 620⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff sued alleging that on December 6, 1932, defendant issued his check, drawn on the First National Bank of Chicago, to the order of one Philip Sultan, for \$435.79, which Sultan on the same day endorsed and delivered to plaintiff for a valuable consideration; that on December 8, 1932, plaintiff deposited the check with another bank, which presented the same for payment, which was refused. A copy of the check, together with an affidavit to the effect that there was due, with interest, the sum of \$473.86, was attached to the statement of claim.

Defendant filed an affidavit of merits, claiming a good defense to the whole demand, in that the check was delivered by defendant to Philip Sultan upon condition that Sultan would deposit sufficient funds to cover the amount of the check before actual use thereof; that Sultan did not make the deposit as agreed; that plaintiff received the check without consideration, and that she is not a holder in due course.

There was a trial by the court without a jury, and the court entered judgment on a finding for plaintiff in the sum of \$435.79. The principal error assigned and argued is the rejection of evidence offered by defendant. On the trial the check was received in evidence, and plaintiff testified to the genuineness of the endorsement on it. She also testified that she received the check through her agent, Mr. Lassen, who deposited it in the bank for her; that the check was returned on account of insufficient

277 17 650

27. THE UNITED STATES OF AMERICA, by and through the undersigned, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Department of State.

Witness my hand and official seal at Washington, D. C., this 17th day of July, 1917.

By the Secretary of State,
J. M. WILSON,
Secretary of State.

Attest:
J. M. WILSON,
Secretary of State.

Whereas the undersigned, J. M. WILSON, Secretary of State, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Department of State.

Witness my hand and official seal at Washington, D. C., this 17th day of July, 1917.

By the Secretary of State,
J. M. WILSON,
Secretary of State.

Attest:
J. M. WILSON,
Secretary of State.

Whereas the undersigned, J. M. WILSON, Secretary of State, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the records of the Department of State.

Witness my hand and official seal at Washington, D. C., this 17th day of July, 1917.

By the Secretary of State,
J. M. WILSON,
Secretary of State.

Attest:
J. M. WILSON,
Secretary of State.

funds to pay it, and that no part of it had been paid. Her evidence showed that the payee of the check, Mr. Sultan, died in 1933.

Defendant testified to the effect that he did not have any knowledge prior to the death of Sultan that the check had been presented for payment; that the first notice he had that the check was in existence was a letter he received from counsel for plaintiff; that he did not know before that time that the check had come into the hands of plaintiff; that he had never heard of her and had no acquaintance with her and had received no money from her or from anyone on her account; further, that he received no notice from the bank that the check had been presented, and that he did not know that it had been returned, "Not sufficient funds," and that he received no notice from anyone. Defendant offered to show that the check was given conditionally; that it was not to be taken or used; that no consideration whatever was given at the time it was made; that on that date the payee, Philip Sultan, told defendant that he had a bill to be paid at the Chicago Title & Trust Co., and asked him to give him a check for \$435.79; that defendant told him that he could not lend him the money because he did not have it; that Sultan told defendant that if defendant would make out the check he (Sultan) would not use it until he had made a deposit in defendant's account in cash to cover the amount of the check; that he (Sultan) had some money coming in the next morning and that he would make such deposit before he would deliver the check; that subsequently on the same day defendant saw Sultan, who told him that he had made other arrangements and had destroyed the check; that defendant had never heard from him or anyone else until May, 1933, which was shortly after Sultan's death; that ^{at} the time Sultan asked defendant for the check there was no money due from defendant to Sultan; that on the contrary defendant had done work for Sultan, for which he had not been paid, and that this arrange-

There is no way to know if it had been paid, but the
 Jones showed that the money was paid, and in 1920,
 Johnson testified to the effect that he did not know
 any knowledge prior to the death of Jones that the money had been
 requested for payment; that the letter asking for the money
 was in existence was a letter he received from someone who phoned
 him; that he did not know before that time that the money was
 come into the hands of Johnson; that he had never heard of the
 and had no acquaintance with her and had received no money from
 her or from anyone on her account; however, that he received no
 money from the bank that the money had been deposited, and that
 he did not know that it had been deposited, that with him, and
 and that he received no money from anyone, Johnson testified to
 that the money was given to him; that it was not to be
 taken on credit; that no consideration whatever was given at the time
 it was made; that on that date the money, William Johnson, told the
 witness that it was a gift to him as well as the witness; that a witness
 told him that he give him a check for \$100.00; that Johnson
 told him that he could not find him and never received the money
 from him; that Johnson told him that it was a gift; that Johnson
 told him that he (Johnson) would not see it until he had made a de-
 posit in the bank's account in cash to cover the amount of the
 check; that he (Johnson) had some money owing in the bank at the time
 and that he would make such deposit before he would deliver the
 check; that subsequently to the date the witness and Johnson, who
 told him that he had made such arrangement and had delivered the
 check; that Johnson had never heard from him or anyone else until
 May, 1920, which was exactly three months later; that the time
 Johnson asked Johnson for the money that he owed him was
 Johnson to Johnson; that on the money Johnson had some money
 for Johnson, for which he had not been paid, and that this money-

ment for the check was similar to other arrangements, Sultan having no bank account. An objection by plaintiff to this evidence was sustained.

The law applicable will be found in the Negotiable Instruments act. Under section 55 of that act (Smith-Hurd's Ill. Rev. Stats. 1933, chap. 98, sec. 55, par. 75, pp. 1925-1926), it is provided that the title of a person who negotiates an instrument is defective whenever he negotiates it in breach of faith or under such circumstances as amount to fraud, and in such case (Smith-Hurd's Ill. Rev. Stats. 1933, chap. 98, sec. 59, par. 79, pp. 1926-1927) the burden is cast on the holder to prove that he acquired title as a holder in due course.

Without expressing any opinion as to the probability of such a transaction as defendant offered to prove, it must be conceded that, if true, the negotiation of the check by Sultan was in breach of faith, and for that reason the court erred in excluding the evidence.

There is another reason, however, why this evidence should have been admitted. Section 185 of the Negotiable Instruments act (Smith Hurd's Ill. Rev. Stats. 1933, chap. 98, sec. 185, par. 207) provides in substance that a check must be presented within a reasonable time after its issue and notice of dishonor given to the drawer as provided for in cases of bills of exchange, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. The uncontradicted evidence in this case is to the effect that no notice of the dishonor of this check was given to the maker. Defendant was therefore discharged to the extent of his loss caused thereby. Prior to the enactment of the Negotiable Instruments act, it was the rule in this State that the burden was on plaintiff to prove in such case that defendant had not been damaged by the failure to give notice of dishonor. 2

went for the other was similar to other circumstances, unless having
no back account. In addition to this evidence was
submitted.

The law applicable will be found in the following section:
Under section 5 of that act (Mich.-Stat. 1931, Sec.
1234, 1931, Chap. 98, Sec. 1234, 1931, 1931-1932), it is
provided that the title of a person who executes an instrument is
defective whenever he executes it in breach of faith or under
such circumstances as would be fraud, and in such cases (Mich.-
Stat. 1931, Sec. 1234, 1931, Chap. 98, Sec. 1234, 1931, 1931-1932)
the burden is cast on the person who claims that he has
acquired title as a holder in due course.

Without expressing my opinion as to the probability of
such a transaction as defendant claims to have, it may be
conceded that, if true, the acquisition of the title by defendant was
in breach of faith, and the fact remains the court erred in ex-
cluding the evidence.

There is another point, however, why this evidence should
have been admitted. Section 1234 of the Michigan Statutes (Mich.-
Stat. 1931, Sec. 1234, 1931, Chap. 98, Sec. 1234, 1931, 1931-1932)
provides in substance that a check may be presented within a
reasonable time after the issue and notice of endorsement given to the
drawee as provided for in section 1234 of the Statutes, or the drawer
will be discharged from liability insofar as the amount of the check
is concerned by the delay. The unadmitted evidence in this case is
to the effect that no notice of the amount of this check was
given to the bank. Defendant was certainly discharged to the ex-
tent of his loss caused thereby. What is the amount of the
defendant's interest? It was the rule in this case that the
burden was on defendant to prove in each case that defendant had
not been discharged by the failure to give notice of dishonor.

Greenleaf on Evidence, sec. 195 a, Willette v. Paine, 43 Ill. 432; Stevens v. Park, 73 Ill. 387; Arnold v. Mangan, 89 Ill. App. 327. Since the enactment of the Negotiable Instruments act the third division of this court (one of the Judges dissenting) held that the same rule was applicable. National Plumbing & Heating Supply Co. v. Stevenson, 213 Ill. App. 49. There is, however, a conflict of authority on this point. Daniels on Negotiable Instruments, 7th ed., pp. 1813-14, sec. 1773; Sims v. Hunter, 44 Idaho, 405; Ryckman v. Fox Film Corporation, 188 Cal. 271.

On either theory, the judgment must be reversed. If the burden was upon plaintiff, then she failed to prove a fact essential to recovery; if upon defendant, then the excluded evidence was admissible as tending to show that defendant had sustained actual loss through failure of plaintiff to give notice of dishonor. As defendant points out, the requirement as to notice would seem to be of more than ordinary importance where, as here, the endorser is in bad financial condition. First National Bank of Kewanee v. Wine, 255 Ill. App. 578. The question of whether plaintiff was a bona fide holder of the check for value is not controlling on this record.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, J., concurs.

O'Connor, P. J., dissents. (See next page.)

In my opinion the judgment should be affirmed.

The evidence shows that plaintiff was a bona fide holder of the check and therefore the conversation between the defendant (the maker of the check) and Sultan, the payee, could in no way be considered a defense.

I am also of opinion that plaintiff was not required to notify the defendant that the bank on which it was drawn refused to pay the check on account of insufficient funds, because the record discloses that at the time defendant drew and delivered the check to Sultan he knew he had but about \$60 in the bank subject to the check, while the check was for more than \$435. Sec. 113 of the Negotiable Instrument Law, chapter 98, page 1924, Cahill's 1933 Statutes, provides: "Notice of dishonor is not required to be given to the drawer in either of the following cases: ***

"4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument." And the fact that defendant testified to what was said at the conversation between him and the payee, Sultan, just prior to the execution and delivery of the check, to the effect that Sultan would deposit in defendant's checking account sufficient money before the check was presented to make the check good, could in no way affect plaintiff, who was a bona fide holder of the check.

to my opinion the evidence would be sufficient to establish the fact that the defendant was a person who was involved in the conspiracy between the defendant and the other persons named in the indictment, and that the defendant was a person who was involved in the conspiracy between the defendant and the other persons named in the indictment.

I am also of opinion that the evidence would be sufficient to establish the fact that the defendant was a person who was involved in the conspiracy between the defendant and the other persons named in the indictment, and that the defendant was a person who was involved in the conspiracy between the defendant and the other persons named in the indictment. The evidence would be sufficient to establish the fact that the defendant was a person who was involved in the conspiracy between the defendant and the other persons named in the indictment, and that the defendant was a person who was involved in the conspiracy between the defendant and the other persons named in the indictment.

11. When the government has no direct evidence on which to base its case, it must rely on circumstantial evidence. The government has no direct evidence on which to base its case, and it must rely on circumstantial evidence. The government has no direct evidence on which to base its case, and it must rely on circumstantial evidence. The government has no direct evidence on which to base its case, and it must rely on circumstantial evidence.

37501

JOSEPH B. GILBERT,
Appellant.

vs.

REYFAL BUILDING CORPORATION and
LAWYERS BUILDING CORPORATION,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

277 I.A. 621¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a statement of claim which averred that he was entitled to the possession of certain goods and chattels of the value of \$1,000 as his own property; that defendants took the goods and disposed of them to their own use and refused to deliver the same to plaintiff when requested.

Defendants filed an affidavit of merits which denied that they took the goods and chattels wrongfully and denied that plaintiff was entitled to the possession of the same, for the reason, as averred, that defendants had a lien on the same for the sum of \$150 under an agreement by which defendants stored the chattels at the request of plaintiff. Plaintiff by leave filed a replication denying the execution of such agreement. The cause was tried by the court, and there was a finding for defendants and judgment, from which plaintiff has appealed.

The goods and chattels in controversy consist of law books and office furniture. The evidence shows that in April, 1932, plaintiff, a practicing lawyer, was a sub-tenant in a building in Chicago owned and operated by defendants at 100 North LaSalle street. Plaintiff occupied room 315 where he was in possession of these books and furniture, and at that time the tenant from whom plaintiff sub-leased moved out of the building. Plaintiff's testimony is to the effect that he at that time called on Mr. Seeley, the manager of defendants' building, and told him that he would move out at the end of the month. Plaintiff says that Seeley suggested

THOMAS J. GILBERT,

Attorney at Law,

et al.

THE ALABAMA POWER CO.,
PLANT 1, AND PLANT 2,
AND PLANT 3, IN THE COUNTY OF
DADE, FLORIDA.

ALABAMA POWER CO.,
PLANT 1, AND PLANT 2,
AND PLANT 3, IN THE COUNTY OF
DADE, FLORIDA.

vs.

ST. L. A. 081

THE ALABAMA POWER CO.,
PLANT 1, AND PLANT 2,
AND PLANT 3, IN THE COUNTY OF
DADE, FLORIDA.

Plaintiff filed a petition of writ of habeas corpus and

he was entitled to the possession of certain lands and

of the value of \$1,000 as his own property; that defendant

had been and disposed of them to third parties and was

liable and came to plaintiff when requested.

Defendant filed an affidavit in denial and asked that

they look the facts and decide whether or not plaintiff

still was entitled to the possession of the lands, and the

return, that defendant had a lien on the lands for the

sum of \$1,000 and that plaintiff was not entitled to the

possession of the lands. Plaintiff by leave filed a

petition for writ of habeas corpus. The writ was

granted, and there was a finding that defendant had

no right to the lands.

The writ was granted in defendant's favor and the

land was returned to plaintiff. The writ was

granted, and there was a finding that defendant had

no right to the lands. Plaintiff by leave filed a

petition for writ of habeas corpus. The writ was

granted, and there was a finding that defendant had

no right to the lands. Plaintiff by leave filed a

petition for writ of habeas corpus. The writ was

granted, and there was a finding that defendant had

that he sub-lease another room in defendants' building and to that end took plaintiff to the twenty-fourth floor of the building where he introduced him to another attorney, Mr. Jacobson, who with his partner, Mr. Shapiro, occupied a suite on that floor; there plaintiff was shown a furnished room smaller than the one he had theretofore occupied.

Plaintiff further says that he at that time told Seeley that his furniture would not go into the smaller room and that Seeley said, "We will store it for you"; that plaintiff told Seeley he would not wish to pay any storage, and if he had to pay storage he might as well get a room where he could put his furniture; that Seeley replied he would store his furniture free of charge. Plaintiff says he asked Seeley how long the lease had to run, and he replied, "To September, 1933." With that understanding plaintiff moved into the smaller room about May 1st, 1932. He thereafter occupied this room up to about September 30, 1933.

The uncontradicted evidence shows that plaintiff paid the rent in full for the room occupied by him and that he is not indebted in that respect. At the termination of the sub-lease plaintiff demanded his books and furniture, but defendants refused to deliver the same, holding them under a claim that plaintiff was indebted in the amount of \$150, or \$10 a month for fifteen months, for their storage, and that defendants had a lien on the chattels for that sum.

The testimony of plaintiff as to the actual transaction is corroborated by Jacobson and also by Shapiro. Seeley testified that plaintiff rented the room from Jacobson and Shapiro at \$35 a month, but says that he told plaintiff he would store his furniture and books free of charge for only 30 or 60 days; that at the expiration of three months he asked plaintiff to remove his property and told him he would thereafter have to pay \$10 a month for holding the

same.

Kollie, superintendent of the building of defendants, testified that in July, 1932, he called plaintiff's attention to the fact that his property was in storage and asked him to remove it; that plaintiff said he was not in a position to take it out; that he (Kollie) told him that if it was going to remain there he would have to charge him at the rate of \$10 a month, to which plaintiff agreed. This conversation is denied by plaintiff.

Plaintiff argues that defendants by reason of limitations of their charter could not obtain a lien for storage charges, but we regard a consideration of that question as unnecessary. A careful examination of the record discloses that a clear preponderance of the evidence sustains the contention of plaintiff that in consideration of his taking a sub-lease in their building defendants agreed to store the books and furniture free of charge. Three witnesses testified to that effect, and all the circumstances in evidence indicate that they gave the true account of what occurred, because their narration is most probable and therefore most reasonable. The testimony of Seeley under all the circumstances we regard as highly improbable. Plaintiff would hardly sub-lease the smaller room for more than a year and arrange storage for only two or three months. The finding should have been for the plaintiff and not for the defendants.

Plaintiff introduced evidence as to the value of the books and furniture wrongfully held by defendants, and defendants produced no evidence to the contrary. The evidence for plaintiff indicates that the goods and chattels were of the value of \$863 at the time they were converted by defendants, but the testimony as to \$100 of this amount is, we think, not definite enough to sustain a finding. We therefore find the fair and reasonable market value of all the goods and chattels converted and retained by defendants

on October 4, 1933, the date upon which plaintiff demanded the same, to be \$763, and plaintiff is entitled to recover that amount with interest thereon from October 4, 1933, to the date of the filing of this opinion, at five per cent per annum, amounting to \$41.44, making a total amount of \$804.44.

Under section 89 of the Civil Practice Act, Cahill's Statutes 1933, p. 2161, no further finding of facts is necessary.

REVERSED, WITH JUDGMENT HERE FOR \$804.44.

O'Connor, P. J., and McSurely, J., concur.

37514

MELLIE LOHMAN,
Appellee,

vs.

REINHOLD NELSON,
Appellant.

757
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

277 I.A. 621²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Mrs. Lohman, Mrs. Newman and Miss Colton on December 2, 1931, while crossing the intersection of Western avenue and Pershing road (public streets in the city of Chicago) in a Nash automobile driven by its owner, Mrs. Florence Trafton, were injured by reason of a collision between the automobile and the truck owned and driven by defendant, Reinhold Nelson. They severally brought suits in case against defendant to recover damages. There were pleas of not guilty in each case, and by stipulation the suits were consolidated for trial, which was by the court without a jury. The finding in each case was for plaintiff, and there were judgments amounting to \$500 in favor of Mrs. Lohman, \$150 for Miss Colton and \$200 for Mrs. Newman.

In each case the defendant appealed, and these appeals have been consolidated for hearing in this court. In each appeal it is urged by defendant that the finding is against the weight of the evidence, and that as a matter of fact the preponderance of evidence is in favor of defendant; further, that the court erred in refusing to permit defendant's counsel to use a written statement which had been shown by plaintiff's counsel to one of the witnesses.

The accident occurred at the intersection above named at a little before six p. m. Western boulevard extends north and south; Pershing road (also known as 39th street) east and west. The traffic at this time of the day was fairly heavy and was controlled by

A. 575

DATE: _____

38

10

129. A. I. 772

T-600M, 1000000, 1000000, 1000000, 1000000

... a ... of ...

CONFIDENTIAL

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 05-10-2010 BY 60322 UCBAW

1970-1971

Paragraph 44.6.2 of the contract states that the contractor shall be responsible for obtaining all necessary permits and licenses for the work.

1973-1974

4028 31000 200 70 600 1000 100 100 100 100 100 100

Copyright © 2004 John Wiley & Sons, Inc.

201 12/1 1964, 11-12-1964, 13-12-1964, 14-12-1964, 15-12-1964, 16-12-1964, 17-12-1964, 18-12-1964, 19-12-1964, 20-12-1964, 21-12-1964, 22-12-1964, 23-12-1964, 24-12-1964, 25-12-1964, 26-12-1964, 27-12-1964, 28-12-1964, 29-12-1964, 30-12-1964, 31-12-1964, 1-1-1965, 2-1-1965, 3-1-1965, 4-1-1965, 5-1-1965, 6-1-1965, 7-1-1965, 8-1-1965, 9-1-1965, 10-1-1965, 11-1-1965, 12-1-1965, 13-1-1965, 14-1-1965, 15-1-1965, 16-1-1965, 17-1-1965, 18-1-1965, 19-1-1965, 20-1-1965, 21-1-1965, 22-1-1965, 23-1-1965, 24-1-1965, 25-1-1965, 26-1-1965, 27-1-1965, 28-1-1965, 29-1-1965, 30-1-1965, 31-1-1965, 1-2-1965, 2-2-1965, 3-2-1965, 4-2-1965, 5-2-1965, 6-2-1965, 7-2-1965, 8-2-1965, 9-2-1965, 10-2-1965, 11-2-1965, 12-2-1965, 13-2-1965, 14-2-1965, 15-2-1965, 16-2-1965, 17-2-1965, 18-2-1965, 19-2-1965, 20-2-1965, 21-2-1965, 22-2-1965, 23-2-1965, 24-2-1965, 25-2-1965, 26-2-1965, 27-2-1965, 28-2-1965, 29-2-1965, 30-2-1965, 31-2-1965, 1-3-1965, 2-3-1965, 3-3-1965, 4-3-1965, 5-3-1965, 6-3-1965, 7-3-1965, 8-3-1965, 9-3-1965, 10-3-1965, 11-3-1965, 12-3-1965, 13-3-1965, 14-3-1965, 15-3-1965, 16-3-1965, 17-3-1965, 18-3-1965, 19-3-1965, 20-3-1965, 21-3-1965, 22-3-1965, 23-3-1965, 24-3-1965, 25-3-1965, 26-3-1965, 27-3-1965, 28-3-1965, 29-3-1965, 30-3-1965, 31-3-1965, 1-4-1965, 2-4-1965, 3-4-1965, 4-4-1965, 5-4-1965, 6-4-1965, 7-4-1965, 8-4-1965, 9-4-1965, 10-4-1965, 11-4-1965, 12-4-1965, 13-4-1965, 14-4-1965, 15-4-1965, 16-4-1965, 17-4-1965, 18-4-1965, 19-4-1965, 20-4-1965, 21-4-1965, 22-4-1965, 23-4-1965, 24-4-1965, 25-4-1965, 26-4-1965, 27-4-1965, 28-4-1965, 29-4-1965, 30-4-1965, 31-4-1965, 1-5-1965, 2-5-1965, 3-5-1965, 4-5-1965, 5-5-1965, 6-5-1965, 7-5-1965, 8-5-1965, 9-5-1965, 10-5-1965, 11-5-1965, 12-5-1965, 13-5-1965, 14-5-1965, 15-5-1965, 16-5-1965, 17-5-1965, 18-5-1965, 19-5-1965, 20-5-1965, 21-5-1965, 22-5-1965, 23-5-1965, 24-5-1965, 25-5-1965, 26-5-1965, 27-5-1965, 28-5-1965, 29-5-1965, 30-5-1965, 31-5-1965, 1-6-1965, 2-6-1965, 3-6-1965, 4-6-1965, 5-6-1965, 6-6-1965, 7-6-1965, 8-6-1965, 9-6-1965, 10-6-1965, 11-6-1965, 12-6-1965, 13-6-1965, 14-6-1965, 15-6-1965, 16-6-1965, 17-6-1965, 18-6-1965, 19-6-1965, 20-6-1965, 21-6-1965, 22-6-1965, 23-6-1965, 24-6-1965, 25-6-1965, 26-6-1965, 27-6-1965, 28-6-1965, 29-6-1965, 30-6-1965, 31-6-1965, 1-7-1965, 2-7-1965, 3-7-1965, 4-7-1965, 5-7-1965, 6-7-1965, 7-7-1965, 8-7-1965, 9-7-1965, 10-7-1965, 11-7-1965, 12-7-1965, 13-7-1965, 14-7-1965, 15-7-1965, 16-7-1965, 17-7-1965, 18-7-1965, 19-7-1965, 20-7-1965, 21-7-1965, 22-7-1965, 23-7-1965, 24-7-1965, 25-7-1965, 26-7-1965, 27-7-1965, 28-7-1965, 29-7-1965, 30-7-1965, 31-7-1965, 1-8-1965, 2-8-1965, 3-8-1965, 4-8-1965, 5-8-1965, 6-8-1965, 7-8-1965, 8-8-1965, 9-8-1965, 10-8-1965, 11-8-1965, 12-8-1965, 13-8-1965, 14-8-1965, 15-8-1965, 16-8-1965, 17-8-1965, 18-8-1965, 19-8-1965, 20-8-1965, 21-8-1965, 22-8-1965, 23-8-1965, 24-8-1965, 25-8-1965, 26-8-1965, 27-8-1965, 28-8-1965, 29-8-1965, 30-8-1965, 31-8-1965, 1-9-1965, 2-9-1965, 3-9-1965, 4-9-1965, 5-9-1965, 6-9-1965, 7-9-1965, 8-9-1965, 9-9-1965, 10-9-1965, 11-9-1965, 12-9-1965, 13-9-1965, 14-9-1965, 15-9-1965, 16-9-1965, 17-9-1965, 18-9-1965, 19-9-1965, 20-9-1965, 21-9-1965, 22-9-1965, 23-9-1965, 24-9-1965, 25-9-1965, 26-9-1965, 27-9-1965, 28-9-1965, 29-9-1965, 30-9-1965, 31-9-1965, 1-10-1965, 2-10-1965, 3-10-1965, 4-10-1965, 5-10-1965, 6-10-1965, 7-10-1965, 8-10-1965, 9-10-1965, 10-10-1965, 11-10-1965, 12-10-1965, 13-10-1965, 14-10-1965, 15-10-1965, 16-10-1965, 17-10-1965, 18-10-1965, 19-10-1965, 20-10-1965, 21-10-1965, 22-10-1965, 23-10-1965, 24-10-1965, 25-10-1965, 26-10-1965, 27-10-1965, 28-10-1965, 29-10-1965, 30-10-1965, 31-10-1965, 1-11-1965, 2-11-1965, 3-11-1965, 4-11-1965, 5-11-1965, 6-11-1965, 7-11-1965, 8-11-1965, 9-11-1965, 10-11-1965, 11-11-1965, 12-11-1965, 13-11-1965, 14-11-1965, 15-11-1965, 16-11-1965, 17-11-1965, 18-11-1965, 19-11-1965, 20-11-1965, 21-11-1965, 22-11-1965, 23-11-1965, 24-11-1965, 25-11-1965, 26-11-1965, 27-11-1965, 28-11-1965, 29-11-1965, 30-11-1965, 31-11-1965, 1-12-1965, 2-12-1965, 3-12-1965, 4-12-1965, 5-12-1965, 6-12-1965, 7-12-1965, 8-12-1965, 9-12-1965, 10-12-1965, 11-12-1965, 12

[illegible]

Small, dark, round, black, smooth, hard, and brittle.

[Faint, illegible text]

• We do not intend to do it in the future, however

THE UNIVERSITY OF CHICAGO PRESS

[illegible]

— 110 —

• **2000**

as the human body is not designed for the stresses of a long run.

[illegible]

SECRET AND UNCLASSIFIED (EXCEPT WHERE SHOWN OTHERWISE) (U) (S) (C) (U)

It is not possible to determine the exact date of the first publication of the book, but it is known that it was published in the early 19th century.

a South Park policeman. The collision occurred in the north part of the intersection at about the center of Western avenue when the Nash automobile, travelling north at a speed of 35 miles an hour, swerved somewhat to the west but nevertheless hit the truck which was being driven west. The police officer was stationed at a "safety island" so-called, situated in the center of Western avenue on the north side of Pershing road. The witnesses are agreed that traffic had been halted on Pershing road and was moving in Western boulevard; that, however, just prior to the accident the policeman blew his whistle to indicate that the traffic on Western boulevard should halt and that the east and west traffic on Pershing road should proceed.

The issue of fact between parties is with reference to the relative positions of the Nash auto and the truck at the time the policeman directed this change of traffic. The contention of defendant is that the Nash was at that time 75 to 150 feet south of Pershing road on Western avenue; also that the truck of defendant did not start across the intersection until after the whistle had been sounded. Plaintiff contends that the Nash at that time was at least either at the intersection or so close to it that it could not be stopped and that the truck had proceeded part way across the intersection before the sounding of the whistle.

Mrs. Trafton, the driver, says that the front end of her automobile was over the intersection at the time the policeman blew his whistle, - how far she could not truthfully say, and that the truck was then moving. She says she was going with the traffic about 35 miles an hour and about six feet behind another automobile. Mrs. Lohman was in the rear seat of the Nash on the left-hand side; Miss Colton was to her right, and a Mrs. Eckman in the center, while Mrs. Newman sat with the driver in the front seat. Mrs. Lohman

says that as they approached 39th street she was looking east and saw the truck coming; that when she first saw it, it was moving; that at that time "our auto was right in the middle"; that as they crossed 39th street the truck came on and she heard Mrs. Trafton say, "I am afraid he is going to hit us, and I am going to turn to see if I can avoid." This witness did not notice any police at that corner.

Mrs. Newman said that as the Nash car approached Pershing road the Nash didn't slow down; that she noticed to the right a truck moving slowly into Western avenue; that it was not onto Western yet when she saw it; that she saw the policeman standing there facing east, and when the Nash came within a car length of him he raised his hand and blew his whistle and swerved around. She said: "At the time the policeman made this change, I would say our auto was past the sidewalk of 39th street, as to how far past the sidewalk, well, maybe the radiator. The radiator was past the curb line of 39th street." On cross examination she testifies that when she first saw the truck the Nash was past the sidewalk on 39th street and the truck was in slow motion, going at least five miles an hour; that the truck was on the right-hand side on the north side of the street, and that at that time the Nash "was about at the sidewalk on the south side of the street, in on Western avenue." She further said: "Our car kept right on going, we didn't put on any brakes or blow any horn. I would say we got about five feet close to the other car before we made that swerve. I didn't want to see the crash; I covered my eyes." She also testified that the policeman was at his post but she did not hear him blow a whistle.

Margaret Colton testified that as the car approached 39th street she was looking west and saw cars standing still facing east; that she did not see the truck before the collision; that the Nash was moving right along with traffic; that she felt it was

turning and wondered why, and that she did not see the truck coming at all.

Harry K. Mason testified that he was at this time riding in an automobile with his brother going west; that when they came to Western avenue the traffic was going north and south; that his brother, who drove, stopped his car in back of a truck; that he saw the policeman standing in front of a post, and while waiting for the traffic to change the officer blew his whistle; that as the whistle blew, the driver of the truck turned to the west and stretched out his hand; that he noticed the truck move out very slowly in Western avenue; that he saw an automobile going north; that the truck went out very slowly and the car went in front of the truck trying to avoid it, but hit it; that the front bumper on the truck hit the rear bumper of the automobile. He further testified that the front end of this northbound Nash at the time the officer gave the signal to change traffic was 10 or 12 feet south of 39th street but very close to the sidewalk; that he saw the northbound Nash a quarter of a block or a half a block before it got to the corner; that before the policeman blew the whistle the truck started to move very slowly. He would ^{not} say that it moved three feet before the whistle blew - possibly two feet; it was going very slowly.

Alfred Mason testified for plaintiff that he was driving an auto at this time west on 39th street and stopped when he reached the intersection; that there was a truck in front of him, and that while the traffic was going north and south the officer blew his whistle, and that the westbound truck was then moving into Western; that he saw the northbound Nash and that at the time the officer blew his whistle for the traffic to change the car was "slightly south of 39th street," - possibly 10 feet south; that when the officer got ready to blow his whistle the truck had moved out three or four times, probably a foot or eighteen inches at a

turning and wondering why, and that she did not see the truck coming at all.

Harry E. Brown testified that he was at this time riding in an automobile with his mother, Miss Brown; that when they came to Western Avenue and traffic was being halted and stopped; that his mother, who drove, stopped and got out of the truck; that he saw the policeman standing in front of a light, and while waiting for the traffic to change the officer blew his whistle; that as the whistle blew, he drove at the green light and was then and there arrested and his hands were behind his back and when they were taken in front of him; that he was in the automobile at the time; that the truck went the very slowly and was not going in front of the truck trying to avoid it, but that the truck stopped on the track and the rear bumper of the automobile. He further testified that the light was at this intersection and at the time the officer gave the signal to change traffic was in an east-bound position and when officer saw very close to the automobile; that he saw the automobile was a number of a light of a light a black truck is not in the picture; that he saw the policeman blow his whistle and the truck started to move very slowly. He testified that it moved slowly that before the whistle blew - possibly two feet; it was going very slowly.

Alfred James testified that the automobile went on and arriving at about the time when he saw the truck and stopped when he reached the intersection; that there was a truck in front of him, and that while the traffic was being halted and would the officer blow his whistle, and saw the west-bound truck was then moving into Western; that he saw the north-bound truck and that at the time the officer blew the whistle the traffic he stopped the car and "possibly went of 10 to 15 feet" - possibly 10 feet south; that when the officer got down to blow his whistle was then that he saw one truck or two trucks, possibly a lot of light-colored trucks at a

time, until he was slightly out into Western avenue; that the Nash coming from the south tried to go to the west and hooked on the bumper of the truck. On cross examination he said that the truck had rolled down the hill several times before the officer blew his whistle; that it was not true that at the time the whistle had been blown the Nash car was at least 150 feet south of Western; that the policeman at no time waved a newspaper.

There was another man named Stanley Chval in Mason's automobile, who was in a position to see the accident. He testified that when the officer blew his whistle the truck started to cross and that the Nash was then 50 or 75 feet from the corner; that the Nash was coming from the south and that the truck was standing still when the Nash hit it; that when the officer blew the whistle the Nash was under the viaduct going north on Western avenue.

The policeman testifies that at the time he gave the signal the northbound car was at least 150 feet away; that the driver of the truck had not started until the whistle was blown; that the truck stopped and was standing perfectly still when it was struck; that when he blew the whistle he extended his arms out at full length, as was his custom; that he waved a newspaper and tooted his whistle; that when the truck driver stopped the northbound auto was about 50 feet south of the truck. He said he had to jump out of the way of the northbound auto.

August F. Daneek, a commercial artist, drove an auto immediately behind the Nelson truck and was about 30 to 35 feet behind it when the collision occurred; he says the truck started up ahead of him after the officer gave the signal; that he started to follow it but as he approached closer to the crossing he noticed the headlights of an automobile approaching from the south and applied his brakes; that he was under the impression that the automobile would cut in between the two and he wished to be back far enough to avoid

...and, would he was ...
...from the ...
...of the truck. ...
...had noticed ...
...whistle; that it was ...
...been blown ...
...that the policeman ...
...there was another ...
...autocycle, ...
...that when the officer ...
...crossed and ...
...the truck was ...
...still when the ...
...the truck was ...
...The policeman ...
...the truck and ...
...the truck had not ...
...truck stopped ...
...that when he ...
...length, as ...
...his whistle; ...
...auto was about ...
...jump out of ...
...against ...
...nearly ...
...when the ...
...him after ...
...it but as ...
...lights of an ...
...prison; that ...
...sit in between ...

injury. He says that the officer was very much in commotion, had a newspaper in one hand, tried to stop the approaching car but in vain; that when the officer gave the signal this car approaching from the south was approximately 100 to 125 feet south. This witness also says that the truck in front of him did not move forward at all before the whistle blew.

Irving Kolinger, an artist, testified he was with Danek; that going West on Pershing they stopped, as did the truck; that the policeman gave the signal to go straight west but "we hesitated and in the meantime the accident"; that at the time the officer gave the signal for east and west traffic the northbound Nash was about 150 to 200 feet or about a quarter of a block away from Pershing road; that the truck was starting to move when the policeman blew his whistle; but that it couldn't have moved any more than five or ten feet, but it "didn't move at all before the whistle blew."

Defendant testified that he was driving west on 39th street at the time in question; that an officer was there; that he (defendant) stopped there a few minutes; that the officer blew his whistle and the traffic stopped; that the southbound traffic had already stopped when he started to cross Western avenue; that he saw the car coming from the south when it was about 150 or 200 feet from the intersection; that when the officer blew his whistle he started across and got about as far as halfway in the east drive when he saw this auto still coming; that he really didn't know what to do, whether to go ahead or stop, but he stopped, and that although the officer was standing with his arms outstretched and waved the driver of the car to stop, she still came forward; that he saw the car coming all the time as it was entering Western avenue, and he kept on going because he had the right of way; that while he waited the engine was running; that he put his

inquiry. He says that the witness was very much in confusion, but
 a moment later he was asked, "What is the date of the accident?" and in
 value; that when the witness gave the date this was the date of the
 from the South was approximately 10 to 12 feet above the ground. This
 witness also says that the truck is in the line of the witness's
 between the witness and the truck.

Living witness, an artist, testified he was with the witness
 that being West on the street they saw the truck; that the witness
 the witness gave the signal to a car that was in the line of the
 later and in the witness's opinion; that at the time the witness
 later gave the signal the car was in the line of the witness's
 seen was about 100 to 120 feet on about a corner at a right angle
 from the witness's truck; that the truck was in the line of the
 policeman blew the whistle; and that it could have moved any
 more than five or six feet, but it didn't move at all before the
 witness blew.

Defendant testified that he was driving west on 22nd
 street at the time in question; that an officer was there; that he
 (defendant) stopped there a few minutes; that the witness blew
 his whistle and the truck's signal; that the witness's truck
 had already stopped when he started to cross the street; that
 he saw the car coming from the north when it was about 100 to 120
 feet from the intersection; that when the officer blew his whistle
 he started across and got about 10 to 12 feet in the line of the
 when he saw the truck's signal; that he didn't know how many
 to do, whether to go ahead or stop, but he stopped, and that
 although the witness was standing with his back to the witness and
 saved the driver of the car to stop, and still was forward; that
 he saw the car coming all the time as it was entering the street
 across, and he kept on going because he had the light of day;
 that while he was in the car he was running; that he saw the

car in gear after the officer blew the whistle.

Defendant contends that even if it is conceded that the truck began to move before the whistle blew and if it is conceded that such act was negligent, nevertheless it could not be said to be the proximate cause of the collision, and the argument is not without force. An overwhelming preponderance of the evidence, however, is to the effect, we think, that the driver of the Nash automobile was south of the intersection at the time the policeman blew the whistle, indicating that the westbound traffic was to move on 39th street. The testimony of the driver herself on this point is indefinite and uncertain and cannot avail against the positive evidence of the large number of witnesses who are apparently disinterested. We think that the finding in each case was against the preponderance of the evidence, which indicates that the negligence of the driver of the Nash automobile was the sole and proximate cause of the collision by which plaintiffs were injured.

As for these reasons, the judgments must be reversed and the cause remanded, it will be unnecessary to discuss any other alleged error argued.

REVERSED AND REMANDED.

McSurely, J., concurs.

O'Connor, P. J., dissents.

car in rear after the other view the vehicle.
 Defendant contends that it is contended that the
 truck began to move before the vehicle flew out it is contended
 that such act was negligent, nevertheless it could not be said to
 be the proximate cause of the collision, and the argument is not
 without force. An overwhelming preponderance of the evidence,
 however, is to the effect, to wit, that the driver of the last
 automobile was south of the intersection at the time the collision
 man blew the whistle, indicating that the westbound traffic was to
 move on 10th street. The testimony of the driver himself on this
 point is indistinct and uncertain and cannot avail against the
 positive evidence of the large number of witnesses who were
 only slightly varied. The fact that the timing in each case was
 against the preponderance of the evidence, which indicates that
 the negligence of the driver of the last automobile was the cause
 and proximate cause of the collision by which plaintiff was
 injured.

As for those reasons, the defendant may be reversed and
 the cause remanded, it will be unnecessary to discuss any other
 alleged error.

REVERSED AND REMANDED.

Respectfully,
 J. J. Conner, Jr., Clerk.

37515

MARGARET COLTON,
Appellee,

vs.

REINHOLD NELSON,
Appellant.)

58 7
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

277 I.A. 621³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The facts in and the law applicable to this case are the same as in Bellie Lohman v. Reinhold Nelson, Gen. No. 37514, in which an opinion has been this day filed.

For the reasons there stated the judgment here is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, J., concurs.

O'Connor, P. J., dissents.

STARS

RECEIVED OFFICE
JAN 11 1961

NY

RECEIVED OFFICE
JAN 11 1961

348 I.A. 621

RE. JUSTICE MATTHEW ROBERTS THE CHIEF OF THE COURT

The facts in this case are the

same as in Justice Robert J. Kennedy, No. 1014

in which an opinion was filed on 1/11/61.

For the reasons stated the judgment here is

reversed and the cause remanded.

REVEREND AND HONORABLE

Respectfully,
J. Edgar Hoover

Director, F.B.I.

37516

JEWELL KEWMAN,
Appellee,

vs.

REINHOLD NELSON,
Appellant.

5917
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

277 I.A. 621^H

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

The facts in and the law applicable to this case are the same as in Nellie Lohman v. Reinhold Nelson, Gen. No. 37514, in which an opinion has been this day filed.

For the reasons there stated the judgment here is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, J., concurs.

O'Connor, P. J., dissents.

27670

UNITED STATES
DEPARTMENT OF JUSTICE

VS.

JOHN EDGAR HOOVER
ADMINISTRATOR

ST. I. A. 631

RE. JAMES EARL RAYMOND, DELINQUENT TO THE LAWS OF THE UNITED STATES.

The facts in and out of court in this case are the same as in UNITED STATES vs. JAMES EARL RAYMOND, No. 10, 1961, in which an opinion has been filed by the Court. For the reasons stated in the opinion filed in this case the same result is reached. The case is remanded to the District Court for the Eastern District of Missouri, St. Louis, and the cause terminated.

RECORDED AND INDEXED.

Respectfully,
J. E. Hoover,
Director, F. B. I.

37528

LOTTIE AUSTERN,
Appellee,

vs.

HANDEL BROTHERS, INC.,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

277 I.A. 621⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case for negligence and upon trial by jury there was a verdict for plaintiff in the sum of \$650, upon which the court, overruling motions for a new trial and in arrest, entered judgment, which defendant asks us to reverse.

It is urged that the court erred in refusing a motion of defendant at the close of all the evidence for a directed verdict in its favor, in giving and refusing instructions, and that the damages are excessive. Plaintiff has not appeared in this court to support the judgment entered in her favor.

The case went to the jury on a single count which alleged that while plaintiff was a customer in its store defendant negligently and improperly permitted a broken-down chair to be placed for her to sit on; that while she was seated in the chair it gave way, throwing her to the floor, whereby her knee was severely injured.

Defendant contends that as a matter of fact the evidence submitted by plaintiff (which consisted of the testimony of herself and her daughter) did not support the allegations of the declaration as to the specific negligence charged. The evidence for plaintiff tended to show that plaintiff at the time and place in question was offered a chair which was apparently in good condition; that she sat down in it, and that while she was so sitting one of the legs of the chair gave way, throwing her to the floor and, as she testified, injuring her left knee. Plaintiff's evidence showed that she sat upon

the chair for about twenty minutes before the leg of the chair gave way; that she weighed about 120 pounds.

Of course, plaintiff was not entitled to recover upon proof of negligence not alleged. Chicago & Eastern Ry. Co. v. Driscoll, 176 Ill. 330; Crane Co. v. Hogan, 228 Ill. 338. However, if defendant desired to preserve for review the question of whether there was a material variance between the negligence averred and the proofs, it should have objected to the evidence when offered and specifically pointed out the variance. In such case, plaintiff then, if she desired, could have asked leave to amend her declaration so as to make it conform to the proof. Defendant did not adopt this method, and we think the question is not now open to review in this court. Cyc. of Pl. & Pr., vol. 22, pp. 639-40; Puterbaugh's Pl. & Pr., 10th ed., sec. 1193.

The proof shows that after plaintiff fell from the chair she was taken to the emergency hospital in defendant's store and cared for by a nurse, who testified (and her evidence is not contradicted) that plaintiff was offered medical attendance at that time, which she declined to accept.

At the request of defendant two days later Dr. Duff, a physician employed by defendant, visited plaintiff in her home. He testified that at that time he examined plaintiff's knee but found no evidence whatever of any discoloration or any ecchymosis resulting from ruptured blood vessels and no evidence of any swelling; that on palpitation there was no tenderness or pain on deep pressure; that in flexing and extending the leg there was no limitation to either one; that plaintiff complained of pain but the physician was not able to find any pathological condition which would produce the pain of which she complained; that there was no difference in comparison between the right and left knee; that there was no discoloration on her left knee, nor was the skin broken; that plaintiff had no fever at that time and her pulse was normal. The physician says

next day; that the witness saw the same.

How much of the total cost is covered by the government?

[Faint, illegible text]

1946. 1947. 1948. 1949. 1950. 1951. 1952. 1953. 1954. 1955. 1956. 1957. 1958. 1959. 1960. 1961. 1962. 1963. 1964. 1965. 1966. 1967. 1968. 1969. 1970. 1971. 1972. 1973. 1974. 1975. 1976. 1977. 1978. 1979. 1980. 1981. 1982. 1983. 1984. 1985. 1986. 1987. 1988. 1989. 1990. 1991. 1992. 1993. 1994. 1995. 1996. 1997. 1998. 1999. 2000. 2001. 2002. 2003. 2004. 2005. 2006. 2007. 2008. 2009. 2010. 2011. 2012. 2013. 2014. 2015. 2016. 2017. 2018. 2019. 2020. 2021. 2022. 2023. 2024. 2025. 2026. 2027. 2028. 2029. 2030. 2031. 2032. 2033. 2034. 2035. 2036. 2037. 2038. 2039. 2040. 2041. 2042. 2043. 2044. 2045. 2046. 2047. 2048. 2049. 2050. 2051. 2052. 2053. 2054. 2055. 2056. 2057. 2058. 2059. 2060. 2061. 2062. 2063. 2064. 2065. 2066. 2067. 2068. 2069. 2070. 2071. 2072. 2073. 2074. 2075. 2076. 2077. 2078. 2079. 2080. 2081. 2082. 2083. 2084. 2085. 2086. 2087. 2088. 2089. 2090. 2091. 2092. 2093. 2094. 2095. 2096. 2097. 2098. 2099. 2100. 2101. 2102. 2103. 2104. 2105. 2106. 2107. 2108. 2109. 2110. 2111. 2112. 2113. 2114. 2115. 2116. 2117. 2118. 2119. 2120. 2121. 2122. 2123. 2124. 2125. 2126. 2127. 2128. 2129. 2130. 2131. 2132. 2133. 2134. 2135. 2136. 2137. 2138. 2139. 2140. 2141. 2142. 2143. 2144. 2145. 2146. 2147. 2148. 2149. 2150. 2151. 2152. 2153. 2154. 2155. 2156. 2157. 2158. 2159. 2160. 2161. 2162. 2163. 2164. 2165. 2166. 2167. 2168. 2169. 2170. 2171. 2172. 2173. 2174. 2175. 2176. 2177. 2178. 2179. 2180. 2181. 2182. 2183. 2184. 2185. 2186. 2187. 2188. 2189. 2190. 2191. 2192. 2193. 2194. 2195. 2196. 2197. 2198. 2199. 2200. 2201. 2202. 2203. 2204. 2205. 2206. 2207. 2208. 2209. 2210. 2211. 2212. 2213. 2214. 2215. 2216. 2217. 2218. 2219. 2220. 2221. 2222. 2223. 2224. 2225. 2226. 2227. 2228. 2229. 2230. 2231. 2232. 2233. 2234. 2235. 2236. 2237. 2238. 2239. 2240. 2241. 2242. 2243. 2244. 2245. 2246. 2247. 2248. 2249. 2250. 2251. 2252. 2253. 2254. 2255. 2256. 2257. 2258. 2259. 2260. 2261. 2262. 2263. 2264. 2265. 2266. 2267. 2268. 2269. 2270. 2271. 2272. 2273. 2274. 2275. 2276. 2277. 2278. 2279. 2280. 2281. 2282. 2283. 2284. 2285. 2286. 2287. 2288. 2289. 2290. 2291. 2292. 2293. 2294. 2295. 2296. 2297. 2298. 2299. 2300. 2301. 2302. 2303. 2304. 2305. 2306. 2307. 2308. 2309. 2310. 2311. 2312. 2313. 2314. 2315. 2316. 2317. 2318. 2319. 2320. 2321. 2322. 2323. 2324. 2325. 2326. 2327. 2328. 2329. 2330. 2331. 2332. 2333. 2334. 2335. 2336. 2337. 2338. 2339. 2340. 2341. 2342. 2343. 2344. 2345. 2346. 2347. 2348. 2349. 2350. 2351. 2352. 2353. 2354. 2355. 2356. 2357. 2358. 2359. 2360. 2361. 2362. 2363. 2364. 2365. 2366. 2367. 2368. 2369. 2370. 2371. 2372. 2373. 2374. 2375. 2376. 2377. 2378. 2379. 2380. 2381. 2382. 2383. 2384. 2385. 2386. 2387. 2388. 2389. 2390. 2391. 2392. 2393. 2394. 2395. 2396. 2397. 2398. 2399. 2400. 2401. 2402. 2403. 2404. 2405. 2406. 2407. 2408. 2409. 2410. 2411. 2412. 2413. 2414. 2415. 2416. 2417. 2418. 2419. 2420. 2421. 2422. 2423. 2424. 2425. 2426. 2427. 2428. 2429. 2430. 2431. 2432. 2433. 2434. 2435. 2436. 2437. 2438. 2439. 2440. 2441. 2442. 2443. 2444. 2445. 2446. 2447. 2448. 2449. 2450. 2451. 2452. 2453. 2454. 2455. 2456. 2457. 2458. 2459. 2460. 2461. 2462. 2463. 2464. 2465. 2466. 2467. 2468. 2469. 2470. 2471. 2472. 2473. 2474. 2475. 2476. 2477. 2478. 2479. 2480. 2481. 2482. 2483. 2484. 2485. 2486. 2487. 2488. 2489. 2490. 2491. 2492. 2493. 2494. 2495. 2496. 2497. 2498. 2499. 2500. 2501. 2502. 2503. 2504. 2505. 2506. 2507. 2508. 2509. 2510. 2511. 2512. 2513. 2514. 2515. 2516. 2517. 2518. 2519. 2520. 2521. 2522. 2523. 2524. 2525. 2526. 2527. 2528. 2529. 2530. 2531. 2532. 2533. 2534. 2535. 2536. 2537. 2538. 2539. 2540. 2541. 2542. 2543. 2544. 2545. 2546. 2547. 2548. 2549. 2550. 2551. 2552. 2553. 2554. 2555. 2556. 2557. 2558. 2559. 2560. 2561. 2562. 2563. 2564. 2565. 2566. 2567. 2568. 2569. 2570. 2571. 2572. 2573. 2574. 2575. 2576. 2577. 2578. 2579. 2580. 2581. 2582. 2583. 2584. 2585. 2586. 2587. 2588. 2589. 2590. 2591. 2592. 2593. 2594. 2595. 2596. 2597. 2598. 2599. 2600. 2601. 2602. 2603. 2604. 2605. 2606. 2607. 2608. 2609. 2610. 2611. 2612. 2613. 2614. 2615. 2616. 2617. 2618. 2619. 2620. 2621. 2622. 2623. 2624. 2625. 2626. 2627. 26

REF ID: A66666

© 2000 Blackwell Science Ltd, *Journal of Internal Medicine* 247: 293–298

7-10-68

1. *Chlorophyll a* (Chl a) and *Chlorophyll b* (Chl b) are the two main types of chlorophyll found in plants. They are responsible for capturing light energy and converting it into chemical energy through photosynthesis.

| | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-----|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 | 34 | 35 | 36 | 37 | 38 | 39 | 40 | 41 | 42 | 43 | 44 | 45 | 46 | 47 | 48 | 49 | 50 | 51 | 52 | 53 | 54 | 55 | 56 | 57 | 58 | 59 | 60 | 61 | 62 | 63 | 64 | 65 | 66 | 67 | 68 | 69 | 70 | 71 | 72 | 73 | 74 | 75 | 76 | 77 | 78 | 79 | 80 | 81 | 82 | 83 | 84 | 85 | 86 | 87 | 88 | 89 | 90 | 91 | 92 | 93 | 94 | 95 | 96 | 97 | 98 | 99 | 100 |
|---|---|---|---|---|---|---|---|---|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|----|-----|

1. The first of these is the fact that the system is not a simple one, and that the results are not always the same. The second is that the system is not a simple one, and that the results are not always the same.

10. Let us suppose that the law of conservation of energy, as usually stated, is not correct.

TO THE MEMBERS OF THE HOUSE OF REPRESENTATIVES

Journal of Health Politics, Policy and Law

... ..

...and the

CONFIDENTIAL

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

THE UNIVERSITY OF CHICAGO

1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know how well the study was conducted and whether the results are reliable and valid. They also want to know how the study can be used to inform future research.

1990 1991 1992 1993 1994 1995 1996 1997 1998 1999 2000 2001 2002 2003 2004 2005 2006 2007 2008 2009 2010 2011 2012 2013 2014 2015 2016 2017 2018 2019 2020 2021 2022 2023 2024 2025 2026 2027 2028 2029 2030 2031 2032 2033 2034 2035 2036 2037 2038 2039 2040 2041 2042 2043 2044 2045 2046 2047 2048 2049 2050 2051 2052 2053 2054 2055 2056 2057 2058 2059 2060 2061 2062 2063 2064 2065 2066 2067 2068 2069 2070 2071 2072 2073 2074 2075 2076 2077 2078 2079 2080 2081 2082 2083 2084 2085 2086 2087 2088 2089 2090 2091 2092 2093 2094 2095 2096 2097 2098 2099 2100 2101 2102 2103 2104 2105 2106 2107 2108 2109 2110 2111 2112 2113 2114 2115 2116 2117 2118 2119 2120 2121 2122 2123 2124 2125 2126 2127 2128 2129 2130 2131 2132 2133 2134 2135 2136 2137 2138 2139 2140 2141 2142 2143 2144 2145 2146 2147 2148 2149 2150 2151 2152 2153 2154 2155 2156 2157 2158 2159 2160 2161 2162 2163 2164 2165 2166 2167 2168 2169 2170 2171 2172 2173 2174 2175 2176 2177 2178 2179 2180 2181 2182 2183 2184 2185 2186 2187 2188 2189 2190 2191 2192 2193 2194 2195 2196 2197 2198 2199 2200 2201 2202 2203 2204 2205 2206 2207 2208 2209 2210 2211 2212 2213 2214 2215 2216 2217 2218 2219 2220 2221 2222 2223 2224 2225 2226 2227 2228 2229 2230 2231 2232 2233 2234 2235 2236 2237 2238 2239 2240 2241 2242 2243 2244 2245 2246 2247 2248 2249 2250 2251 2252 2253 2254 2255 2256 2257 2258 2259 2260 2261 2262 2263 2264 2265 2266 2267 2268 2269 2270 2271 2272 2273 2274 2275 2276 2277 2278 2279 2280 2281 2282 2283 2284 2285 2286 2287 2288 2289 2290 2291 2292 2293 2294 2295 2296 2297 2298 2299 2300 2301 2302 2303 2304 2305 2306 2307 2308 2309 2310 2311 2312 2313 2314 2315 2316 2317 2318 2319 2320 2321 2322 2323 2324 2325 2326 2327 2328 2329 2330 2331 2332 2333 2334 2335 2336 2337 2338 2339 2340 2341 2342 2343 2344 2345 2346 2347 2348 2349 2350 2351 2352 2353 2354 2355 2356 2357 2358 2359 2360 2361 2362 2363 2364 2365 2366 2367 2368 2369 2370 2371 2372 2373 2374 2375 2376 2377 2378 2379 2380 2381 2382 2383 2384 2385 2386 2387 2388 2389 2390 2391 2392 2393 2394 2395 2396 2397 2398 2399 2400 2401 2402 2403 2404 2405 2406 2407 2408 2409 2410 2411 2412 2413 2414 2415 2416 2417 2418 2419 2420 2421 2422 2423 2424 2425 2426 2427 2428 2429 2430 2431 2432 2433 2434 2435 2436 2437 2438 2439 2440 2441 2442 2443 2444 2445 2446 2447 2448 2449 2450 2451 2452 2453 2454 2455 2456 2457 2458 2459 2460 2461 2462 2463 2464 2465 2466 2467 2468 2469 2470 2471 2472 2473 2474 2475 2476 2477 2478 2479 2480 2481 2482 2483 2484 2485 2486 2487 2488 2489 2490 2491 2492 2493 2494 2495 2496 2497 2498 2499 2500 2501 2502 2503 2504 2505 2506 2507 2508 2509 2510 2511 2512 2513 2514 2515 2516 2517 2518 2519 2520 2521 2522 2523 2524 2525 2526 2527 2528 2529 2530 2531 2532 2533 2534 2535 2536 2537 2538 2539 2540 2541 2542 2543 2544 2545 2546 2547 2548 2549 2550 2551 2552 2553 2554 2555 2556 2557 2558 2559 2560 2561 2562 2563 2564 2565 2566 2567 2568 2569 2570 2571 2572 2573 2574 2575 2576 2577 2578 2579 2580 2581 2582 2583 2584 2585 2586 2587 2588 2589 2590 2591 2592 2593 2594 2595 2596 2597 2598 2599 2600 2601 2602 2603 2604 2605 2606 2607 2608 2609 2610 2611 2612 2613 2614 2615 2616 2617 2618 2619 2620 2621 2622 2623 2624 2625 2626 2627 2628 2629 2630 2631 2632 2633 2634 2635 2636 2637 2638 2639 2640 2641 2642 2643 2644 2645 2646 2647 2648 2649 2650 2651 2652 2653 2654 2655 2656 2657 2658 2659 2660 2661 2662 2663 2664 2665 2666 2667 2668 2669 2670 2671 2672 2673 2674 2675 2676 2677 2678 2679 2680 2681 2682 2683 2684 2685 2686 2687 2688 2689 2690 2691 2692 2693 2694 2695 2696 2697 2698 2699 2700 2701 2702 2703 2704 2705 2706 2707 2708 2709 2710 2711 2712 2713 2714 2715 2716 2717 2718 2719 2720 2721 2722 2723 2724 2725 2726 2727 2728 2729 2730 2731 2732 2733 2734 2735 2736 2737 2738 2739 2740 2741 2742 2743 2744 2745 2746 2747 2748 2749 2750 2751 2752 2753 2754 2755 2756 2757 2758 2759 2760 2761 2762 2763 2764 2765 2766 2767 2768 2769 2770 2771 2772 2773 2774 2775 2776 2777 2778 2779 2780 2781 2782 2783 2784 2785 2786 2787 2788 2789 2790 2791 2792 2793 2794 2795 2796 2797 2798 2799 2800 2801 2802 2803 2804 2805 2806 2807 2808

... of

(The following information was obtained from the records of the FBI)

After we had left home, my wife and I went to the bank.

no longer is that time and place was actual. The hypothesis

he could find nothing wrong with her at all; told her to put hot compresses on her left knee in the hope that if she had the pain she complained of this would relieve it.

Plaintiff testified that she was treated for the injury to her knee; that after falling she was taken to the emergency hospital in a wheelchair where she remained about an hour and a half; that she was taken downstairs in the wheelchair and the starter of the elevator put her in a taxicab; that when she arrived home she was not able to get out of the cab herself but was helped out by two customers in her husband's store and her husband; that she was put to bed and was in bed three weeks without getting up, then for two weeks she would get up and go back to bed, but would walk around the house; that on the first day she was home a physician, whose name she does not know, called on her; that she then called her own physician, Dr. Frankel, who saw her about 23 or 24 times; that he came every day for the first three weeks and after that every two or three days. She says that in falling she hit her forehead; that she had severe pain in the top of her head, and that she still has headaches and dizzy spells. Neither the physician who called on the first day nor her own doctor was produced as a witness in the case, nor is their absence accounted for. The customers in her husband's store who assisted her out of the cab when returning home after the accident were also not produced.

At the request of plaintiff the court instructed the jury that if defendant was liable, plaintiff was entitled to recover for bodily and mental suffering, if any, which she had theretofore undergone or might reasonably be expected to undergo in the future. The instruction was clearly erroneous, since it should have limited the damages to those alleged and proved.

Defendant says that the case was tried upon the theory that

he would find nothing wrong with her at all; told her it was not
 necessary on her part to do anything else; it was not the
 the condition of the world that it was.

Finally, after a long time, she was forced to go to the
 her knees; that after talking with her about the emergency, she
 of a woman's life, she was forced to go to the emergency, and
 that; that she was forced to go to the emergency, and the
 of the situation was not in a position; that she was forced
 name was not able to get out of the emergency, and she was
 out by two children in the emergency, and she was forced; that
 she was not able to get out of the emergency, and she was
 then for two weeks she would not be able to get out of the
 with around the house; that on the first day she was not a phys-
 clear, some more she was not able, and she was not able;
 called her and explained, Dr. Brown, who was not able to
 times; that he was not able to get out of the emergency, and
 that every two or three days, she was not able to get out of
 turned; that she was not able to get out of the emergency, and
 the still was not able to get out of the emergency, and she
 who called on the first day and the doctor was not able to
 placed in the case, and she was not able to get out of the
 emergency to get out of the emergency, and she was not able to
 when returning home after the emergency, and she was not able to
 at the moment of the emergency, and she was not able to
 that it was not able to get out of the emergency, and she was
 fully and easily, and she was not able to get out of the
 under the or slight pressure, and she was not able to get out of
 The situation was clearly, and she was not able to get out of
 the changes to those changes, and she was not able to get out of

Delaware, and she was not able to get out of the emergency, and

the rule of res ipsa loquitur was applicable. On the uncontradicted facts that rule could not properly be applied. Welch v. New Harper Hotel Co., 196 Ill. App. 94; Feldman v. Chicago Ry. Co., 212 Ill. App. 482; Letush v. N. Y. C. Ry. Co., 267 Ill. App. 526; Kilgore v. The Shepard Co., 52 R. I. 152.

There are other alleged errors which, in the absence of a brief for plaintiff, is unnecessary to discuss.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

37548

ANTONI GROCHOWSKI,
Appellee,

vs./

POLISH NATIONAL ALLIANCE OF THE
UNITED STATES OF NORTH AMERICA,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

277 I.A. 622¹

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

Defendant Insurance corporation appeals from a judgment in the sum of \$500 entered on the finding of the court in an action brought upon a life insurance policy issued to Jan Grochowski June 3, 1926.

It is urged that the finding of the court is against the preponderance of the evidence. An examination of the testimony, however, discloses no conflict as to material facts, which are that the policy to the amount for which judgment was entered was executed and delivered by defendant society on June 3, 1926, payable on death of Jan Grochowski to plaintiff, his brother; that the death of Jan occurred June 2, 1928; that a request for forms on which to make proofs of death was made to defendant's local agent, who informed the representative of plaintiff that defendant refused to pay on the ground that the insured was not a member of the defendant society at the time of his death because he was automatically suspended January, 1928, for failure to pay his dues, and that he had never been reinstated. The evidence also discloses tender thereafter, to the person in charge of the principal office of defendant company, of the insurance policy, the death certificate and the receipt book, purporting to show the payment of dues and assessments by the deceased; that defendant refused to receive these documents and again denied its liability upon the grounds before stated.

UNITED STATES DEPARTMENT OF JUSTICE

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.
JANUARY 1, 1934

STY I. A. 622

RE: JAMES EARL RAY, ALLEGEDLY KNOWN AS THE GUNSMAN.

Reference is made to the letterhead memorandum dated January 1, 1934, in the case of STY I. A. 622, captioned as above, in which it was stated that a life insurance policy issued to the deceased James

J. RAY.

It is noted that the finding of the court is that the gross amount of the insurance, in consideration of the policy, however, it was no accident as to material loss, which was paid. The policy on the account of the insurance was issued and effected and delivered by defendant on January 1, 1934, payable

on death of the deceased to plaintiff, his heirs; that the death of the deceased James J. RAY, was a result of the fact which is made a part of the record as to the defendant's fatal wound, who informed the representative of plaintiff that defendant refused to pay on the ground that the insurance was not a member of the

defendant society at the time of his death because he was not a member of the society. January, 1934, the failure to pay his death, and that he had never been reinstated. The witness also disclosed further that, in the period in which of the defendant's death in the defendant society, the death certificate and the medical report, regarding to show the payment of the insurance by the defendant; that defendant refused to receive these documents and again denied the identity upon the grounds

before stated.

Defendant contends that the deceased was automatically suspended in January, 1928, by his failure to promptly pay dues and assessments at that time, according to a provision in the by-laws, which it is said required from members monthly payments in advance and automatically suspended members for failure to make such payment. The by-laws have not been abstracted, and we are neither obligated nor disposed to search the record for the purpose of reversing a judgment of this character. Rehfuess v. Hill, 243 Ill. 140; Rousseau v. Poitras, 62 Ill. App. 103. However, the receipt book discloses that on May 18, 1928, payment was made by insured for the five preceding months in 1928. It is true that all the payments were not made in advance, but defendant received and retained them, and so far as this record discloses there has not been at any time any offer by defendant to return the same. Clearly, defendant cannot keep these payments and at the same time be heard to allege that the policy is not in force.

It is urged that there is a variance between the pleadings and the proof, but that question was not called to the attention of the court upon the trial, and defendant can therefore not be heard to urge it here. C. B. & Q. R. R. Co. v. Dickson, 143 Ill. 368; Libby, McNeill & Libby v. Scherman, 146 Ill. 540.

Defendant says that the statement of claim alleged the performance of all the terms of the policy and that the burden was therefore on plaintiff to show a waiver by defendant of strict compliance with provisions of the by-laws as to prompt payments, assessments and dues. The receipt book shows the practice of defendant in waiving strict promptness in this regard. Defendant cites Routa v. Royal League, 274 Ill. App. 152, but that case, in our opinion, sustains plaintiff's contention.

On the uncontradicted evidence we hold defendant was liable. The judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

Defendant's position that the agreement was unenforceable
 was supported in fact, by his failure to comply with the
 and agreement at that time, according to a provision in the
 form, which is in full compliance with the weekly payments in
 advance and unconditionally was made necessary for failure to make
 such payment. The defendant has not been successful, and he has
 neither obligated nor allowed to receive the benefit for the per-
 son of receiving a judgment of the defendant. See Ill. App. Ct.
243 Ill. App. Ct. 111, 112; 243 Ill. App. Ct. 111, 112. Defendant
 the receipt back disclosure that on May 18, 1970, payment was made
 by check for the five previous months in 1970. It is true that
 all the payments were not made in advance, but defendant received
 and retained them, and he has not received disclosure that was
 not been at any time any other or otherwise to return the same.
 Clearly, defendant cannot keep these payments and at the same time
 be able to allege that the policy is not in force.
 It is true that there is a variance between the allegations
 and the proof, but that variance was not raised in the allegations
 of the court upon the trial, and defendant was not able to
 based to raise it later. See Ill. App. Ct. 243 Ill. App. Ct. 111, 112.
243 Ill. App. Ct. 111, 112; 243 Ill. App. Ct. 111, 112.
 Defendant says that the statement of facts offered in
 performance of all the terms of the policy and that the return
 was returned on disability to him as a result of defendant's refusal
 compliance with provisions of the policy as to payment of claims.
 statements and facts. The court has found the evidence of
 defendant in violation of the policy in this regard. Defendant
 also sought to prove that he was not in compliance with the policy, but
 was not able to prove that he was not in compliance with the policy.
 The court has found that defendant was in compliance with the policy.
 The judgment of the court is affirmed.

37574

ANDREW JESACHER,
Defendant in Error,

vs.

ABRAHAM B. LEWIS, MARTHA S. LEWIS
and EDNA M. BAILYE, et al.,
Plaintiffs in Error.

627
ERROR TO SUPERIOR COURT
OF COOK COUNTY.

277 I.A. 622²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

By this writ of error defendants, Abraham B. Lewis, Martha S. Lewis, his wife, and Edna M. Bailye, their daughter, seek to reverse a decree of foreclosure of a trust deed entered November 8, 1933, in the Superior court of Cook county. The cause was heard upon exceptions by these defendants to the report of the master to whom the cause had theretofore been referred. The exceptions were overruled and a decree of foreclosure entered as prayed in the bill and as recommended by the master. The principal contention made by defendants is that the decree erroneously permitted complainant to accelerate the whole indebtedness because of defaults in the payment of interest.

The trust deed executed and delivered was made by Abraham B. Lewis and Martha S. Lewis on December 23, 1929, and conveyed real estate known as 3249 Maryland avenue in Chicago to the Chicago Title & Trust Co., as trustee, to secure the payment of eighteen notes, Nos. 1 to 18, aggregating \$17,000. Principal notes Nos. 1 and 2, which were for \$750 each, were owned by Edna M. Bailye (formerly Edna M. McGee), and these notes and the coupons, evidencing the interest accruing thereon, had been paid and cancelled. Interest notes Nos. 3 and 4 are also owned by Mrs. Bailye but have not been paid. All the rest of these notes, together with the interest coupons, are owned by complainant. Default having been made in the payment of interest notes, complainant exercised an option to declare the whole debt due and filed his bill to foreclose and to declare the whole debt due and filed his bill to foreclose

ARMED DANGEROUS
DEFENDANT IN COURT

vs.

WILLIAM F. LADD, Sheriff of Cook County,
and JOHN A. LADD, et al.,
Plaintiffs in Error.

WRIT OF HABEAS CORPUS

ON JUDICIAL REVIEW

3771 A. 822

MR. JUSTICE BAUGHMAN DELIVERED THE OPINION OF THE COURT.

BY THIS WRIT OF HABEAS CORPUS, ALFRED A. LADD,

Defendant, his wife, and JOHN A. LADD, Sheriff of Cook County,

seek to reverse a decree of foreclosure of a first deed of mortgage

dated November 8, 1935, in the Superior Court of Cook County. The decree

was based upon evidence by which it appeared that the property of

the mortgagor at the time the mortgage was executed had been sold to

defendants and that the mortgage was a deed of foreclosure and not a

deed in fee simple as represented by the mortgage. The plaintiff

and defendant both claim to be the owner of the property and to be

entitled to the proceeds of the sale of the property.

The first deed of mortgage was executed and delivered to plaintiff

on November 8, 1935, and was recorded in Cook County on November 23, 1935.

The mortgage was made to the plaintiff and was in the name of

Chicago Title & Trust Co., as trustee, to secure the payment of

certain notes, \$10,000, and was secured by a deed of mortgage

on the property of the mortgagor, which was then owned by the

defendant (formerly John A. Ladd), and these notes and the mortgage

were delivered to the plaintiff and were then sold and con-

veyed to the defendant. The mortgage was then sold and con-

veyed to the defendant. The mortgage was then sold and con-

veyed to the defendant. The mortgage was then sold and con-

the trust deed on February 18, 1933.

The trust deed in substance provided that if default was made in the payment of any indebtedness secured thereby, either of principal or interest, or in the payment of any tax or assessment, or in case of a breach of any covenant therein contained, "in every such case, all indebtedness secured hereby, with all interest accrued thereon, shall, at the option of the legal holders of said notes, and without notice, become and be at once due and payable, and shall be recoverable by suit at law or by foreclosure hereof, or both, to the same extent as if the same had matured by express terms."

Defendant, Mrs. Bailye, refused to accelerate the indebtedness due under her principal notes Nos. 3 and 4, and defendants contend that under the above provision of the trust deed, complainant, who owned only a part of the notes, could not exercise the election to declare the whole sum due and thus accelerate the maturity of the particular notes of which he was the owner. They insist, on the authority of Marine Bank v. International Bank, 9 Wis. 47, and other similar cases, that a provision of this kind in a trust deed is in the nature of a forfeiture and must be strictly construed, and that a court of equity will grant relief against a forfeiture under such circumstances. While we think that under the law of this State such a provision in a clause in a trust deed is not in the nature of a forfeiture (Hoodless v. Reid, 112 Ill. 106), nevertheless a provision in a trust deed in the language above recited must be reasonably construed to mean that it would be necessary where there are different holders of the indebtedness secured by the trust deed that all these holders should join in the acceleration of the maturity of the indebtedness. Seidel v. Holcomb, 249 Ill. App., 10. In this case, however, Mrs. Bailye entered into an agreement which must be held to have materially modified the provision of the trust deed in this

The trust deed in question dated 12 January 1901.

The trust deed in question provided that it should be

made in the payment of any indebtedness secured thereby, either of principal or interest, or in the payment of any tax or assessment, or in case of a breach of any covenant or condition contained, in every such case, all indebtedness secured hereby, with all interest and costs thereon, shall, at the option of the trustee of said notes, and without notice, be paid by the mortgagor or his assigns, and shall be recoverable by him or his assigns by express or both, at the same time and in the same manner as if expressed therein.

Defendant, Mrs. Mary, failed to comply with the indebtedness due under her original notes and, the defendant, plaintiff, failed to comply with the above provisions of the trust deed, and, who owned only a part of the property, could not enforce the election to enforce the same and was bound to comply with the maturity of the particular notes of which he was the owner. In fact, on the maturity of the Marine Bank v. Williams, 101 Cal. 47, and other similar cases, and a provision in this deed in a trust deed in the nature of a mortgage and was not strictly enforceable, but that a court of equity will grant relief against forfeiture under such circumstances. While no claim was made under the law of this State and a provision in a clause in a trust deed is not in the nature of a mortgage (Williams v. Reid, 101 Cal. 100), nevertheless a provision in a trust deed in the language above cited must be strictly construed so that it would be necessary that there be an intention to create a mortgage secured by the trust deed and all these matters should be taken into account. Seidel v. Holcomb, 249 Ill. App. 10. Section of the statute in the Seidel v. Holcomb, 249 Ill. App. 10. Mrs. Seidel entered into an agreement which would be said to have materially modified the provision of the trust deed in this

respect, in that on January 22, 1930, she entered into a written agreement under seal with the Chicago Title & Trust Co., trustee, for the use and benefit of the legal holder of Notes Nos. 5 to 18 inclusive, "that the lien of the notes owned by said Edna M. McGee shall be and remain at all times a second lien upon the premises thereby conveyed, subject to the lien of the Principal Notes #5 to #18, both inc. for \$1000. each as aforesaid for all advances made or to be made on the notes secured by said last named trust deed and for all other purposes specified therein." Having thus for a valuable consideration subordinated her lien to that of complainant, we think it must be held to have been the intention of the parties to sever the joint power to accelerate the maturity of the notes, and that such must be held to be its effect in a court of equity.

Defendants, however, cannot succeed upon this review for another reason. The record shows that the Chicago Title & Trust Co. as trustee and the Recorder of Deeds of Cook county were parties to the suit below. They have not been made parties to this proceeding, nor has their appearance been entered herein. Defendants have made complainant below the only defendant in error and have taken no steps whatever to summon or sever the other defendants in the trial court. There is abundant authority that under such circumstances the writ of error must be dismissed. Moran v. Cooke Brewing Co., 168 Ill. App. 55; McIntyre v. Sholty, 139 Ill. 171; Bellinger v. Barnes, 221 Ill. 240; Wuerzburger v. Wuerzburger, 221 Ill. 277.

For the reasons indicated the writ of error is dismissed.

WRIT DISMISSED.

O'Connor, P. J., and McSurely, J., concur.

respect, in 1901 on January 22, 1902, and entered into a written
agreement under seal with the defendant in the form of a Trust, dated
for the use and benefit of the said defendant at which time, a
is inclusive, that the title of the estate owned by said
Notes shall be and remain at all times a second lien upon the
premises thereby conveyed, subject to the title of the principal
Notes to be paid, both last, for 1900, then as respects for all
advances made or to be made on the notes secured by said
Notes, trust fund and for all other purposes provided herein.
having then for a valuable consideration relinquished certain
that of commitment, so that it may be said to have been the in-
terest of the parties to enter the joint power to execute the
maturity of the notes, and that each party to the said
in a court of equity.
defendant, however, denied execution of said note and
another reason. The reason above was the same as in the
Co., as trustee and the execution of said note and the parties
to the suit below. They have not been added to this reason-
ing, nor has their execution been denied herein. Defendant have
made complaint before the only defendant in error and have been
knew whatever to know or what the other defendant in the trial
court. There is abundant authority that makes such statements
the writ of error must be allowed. Boyd v. Boyd, 100
108 Ill. App. 2d; Boyd v. Boyd, 100 Ill. App. 2d; Boyd v. Boyd,
108 Ill. App. 2d; Boyd v. Boyd, 100 Ill. App. 2d.
For the reasons stated the writ of error is allowed.
Writ allowed.

37673

CENTRAL REPUBLIC TRUST COMPANY,
as Trustee, etc.,

Appellee.

vs.

MICHIGAN-CHESTNUT BUILDING
CORPORATION, a Corporation,
et al.,

Defendants.

EDWARD E. COHE, CHARLES LAVIN,
IRVING K. RUSS and MYREN SHERMAN,
Appellants,
(Respondents).

63
INTERLOCUTORY APPEAL
FROM CIRCUIT COURT OF
COOK COUNTY.

277 I.A. 622³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Respondents appeal from an order entered June 7, 1934, by which (on petition of complainant mortgagee trustee and the Chicago Title & Trust Co., trustee, intervenor) they are temporarily restrained from prosecuting certain garnishment suits. It appears from the pleadings that defendant Building Corporation on November 15, 1927, made and executed a trust deed to the Central Republic Trust Co. as trustee, conveying its 99 year leasehold estate, with building, etc., situated thereon, to secure a bond issue to the amount of \$575,000 of various denominations. On March 31, 1934, the mortgage trustee, because of defaults as alleged, filed its bill to foreclose. A copy of the trust deed was attached to the bill, which, however, was not verified.

On June 6, 1934, the mortgage trustee filed its petition which we think (although respondents contend to the contrary) was properly verified, setting up the prior proceedings and the provisions of the trust deed and averring that respondents being the owners of certain of these bonds brought suit in the Municipal court of Chicago upon them, and on May 22, 1934, obtained judgment in that court against defendant Building Corporation for \$13,671.81; that on May 28, 1934, respondents caused a garnishment summons to

CENTRAL NATIONAL TRUST COMPANY,
as Trustee, etc.,

Plaintiff,

vs.

ALABAMA-GEORGIA BUILDING
CORPORATION, a Corporation,

et al.,

Defendants.

BEARD & COON, PLAINFIELD, N.J.,
JAMES H. BEARD and JOHN BEARD,
Agents,
(Applicants).

INTERCOMMITTEE REPORT
FROM THE COMMITTEE ON
HOUSE MONITORING

STY I.A. 622

RE. FEDERAL NATIONAL BUILDING AND TRUST COMPANY.

Memorandum dated from the House on June 7, 1934, by

which (an opinion of counsel of the House and the House
little a trust company, trustee, insurance, and the property re-
attained from providing certain financial aid. It appears
from the records that Federal National Building Corporation on November
18, 1932, made and executed a trust deed to the Federal Republic
Trust Co. as trustee, providing for the payment of interest, with
collateral, etc., attached thereto, to secure a bond loan to the
amount of \$27,000 of various organizations. On March 31, 1934,
the mortgage trustee, because of default in payment, filed the
bill to foreclose. A copy of the final deed was referred to the
bill, which, however, was not verified.

On June 2, 1934, the committee reported that the decision
which we think (although undoubtedly subject to the contrary) was
properly verified, arising as the prior proceedings and the matter
when of the first hour was verified that transactions being the
owner of certain of these bonds should still in the United States
of Chicago were then, and on May 26, 1934, obtained judgment in
that court against Federal National Building Corporation for \$12,571.25;
that on May 25, 1934, respondents sought a permanent injunction to

issue against the tenants in possession of the premises or managers thereof, or depositaries of rental collected from the building on the premises. The petition avers that under the provisions of the trust deed, these rentals should be applied to the payment of taxes and rental on the underlying lease; that the rentals remaining after such payments are specifically pledged to the trustee by the terms of the trust deed and that under its terms no owner of any bond or interest coupons has any right or lien upon the property for rents, issues and profits prior to or to the exclusion of the lien of the owners of any unpaid bonds or coupons secured by the trust deed. Petitioner prays an injunction and for other relief.

On the following day, June 7th, the Chicago Title & Trust Co. by leave filed an intervening petition, in which it set up that it was the legal owner of the fee title to the premises; that under a trust agreement of November 15, 1927, it succeeded to the lessors' interest in the leasehold estate. The alleged trust agreement was attached to the petition as Exhibit "A". It provides that in default of payment of rent intervenor might collect the rent from the occupying tenants (sub-lessees) and intervenor would be granted a first, superior and paramount lien on the leasehold estate, building, rents, issues and profits. The petition averred that on November 21, 1932, default having been made by the lessee in payment of taxes, intervenor gave written notice of such default pursuant to the lease; further, that on February 14, 1933, in consideration of intervenor's forbearance, the lessee with the consent of the mortgage trustee agreed that the assignment of rents should be declared operative in favor of intervenor, and that the rents collected after November 22, 1932, should be applied in the sole discretion of the Chicago Title & Trust Co. on ground rent, taxes, etc.; that Frankenstein & Co. was then managing the

1. The first of the two is a provision of the first of the two...
 2. The second is a provision of the second of the two...
 3. The third is a provision of the third of the two...
 4. The fourth is a provision of the fourth of the two...
 5. The fifth is a provision of the fifth of the two...

6. The sixth is a provision of the sixth of the two...
 7. The seventh is a provision of the seventh of the two...
 8. The eighth is a provision of the eighth of the two...
 9. The ninth is a provision of the ninth of the two...
 10. The tenth is a provision of the tenth of the two...

11. The eleventh is a provision of the eleventh of the two...
 12. The twelfth is a provision of the twelfth of the two...
 13. The thirteenth is a provision of the thirteenth of the two...
 14. The fourteenth is a provision of the fourteenth of the two...
 15. The fifteenth is a provision of the fifteenth of the two...
 16. The sixteenth is a provision of the sixteenth of the two...
 17. The seventeenth is a provision of the seventeenth of the two...
 18. The eighteenth is a provision of the eighteenth of the two...
 19. The nineteenth is a provision of the nineteenth of the two...
 20. The twentieth is a provision of the twentieth of the two...

premises and was retained to continue such management under this arrangement, and that the rents have since that time been so applied; that there is due intervenor unpaid rent to the amount of \$63,838.71, and that the sum of \$11,486.74 would be required to meet taxes due July 1, 1934; that the garnishment proceedings have interfered with the collection of these rents and that unless these proceedings are enjoined intervenor would be required to declare a forfeiture of the leasehold estate.

On the same date respondents filed their joint and several verified answers to both petitions, in which they objected to the jurisdiction of the court over their persons and the subject matter of the litigation. They averred that judgment for \$5250 had been entered in the garnishment proceeding upon the answer of one of these tenants and asserted that the trustees should present their claims in the Municipal court of Chicago, not in the Circuit court. The answer further denies that the rights of the trustees are superior to the rights of respondents in the rents garnisheed. This answer was verified.

The order which enjoined respondents also referred the cause to a master to take the evidence and report, and the record indicates that the trial of said cause is proceeding, pending a final decree. We think this court should not indicate its opinion on the points raised by respondents going to the merits of the controversy, but that consideration of these should be reserved until such time, if ever, as a final decree is entered in the case. We therefore express no opinion upon the points in controversy as to whether respondents are precluded from maintaining garnishment by reason of the provisions of the trust deed, whether the filing of the bill gave a certain court jurisdiction of the rents, issues and profits of the mortgaged premises, whether petitioner had an adequate and complete remedy at law in the garnishment proceedings,

proceedings and was retained by counsel with appropriate order rules
enforcement, and that the law is clear that there can be no
claim; that there is no intervention possible in the amount of
\$25,000.00, as some one out of \$10,000.00 would be required to
meet taxes and July 1, 1934; that the Government proceedings have
interfered with the collection of taxes and that unless there
proceedings are enjoined intervention would be required to declare a
foreclosure of the mortgage.

On the same date respondents filed their brief and several
verified answers to both petitions, in which they set out the
falsification of the court ever since its opening and the constant matter
of the litigation. They averred that judgment for \$2500 had been
entered in the Government proceeding upon the answer of one of
these parties and asserted that the evidence would present their
claim in the Federal court of claims, not in the Circuit court.
The answer further denies that the right of the respondents is an
action in the right of respondents in the same business. This
answer was verified.

The order which enjoined respondents was returned the
same to a master to take the evidence and report, and the record
indicated that the trial of each case in succession, pending a
final decree. We think this court should not indicate its opinion
on the points raised by respondents going to the merits of the con-
troversy, as that consideration of these should be reserved until
some time. It even, as a final decree is entered in the case.
We therefore express no opinion upon the points in controversy as
to whether respondents are precluded from maintaining jurisdiction
by reason of the provisions of the act just filed, which the filing
of this bill gave a certain point jurisdiction of the court, leaving
the title of the mortgage pending, without prejudice and an
absolute and complete remedy of law in the Government proceedings.

whether the Chicago Title & Trust Co. was properly allowed to intervene, or whether the agreement by which the rents, issues and profits were assigned to it is valid.

It is urged that the Circuit court erred in enjoining the enforcement of the judgment without requiring a bond in favor of defendant in twice the amount of it. This contention is based on section 8 of the Injunction act (Cahill's Ill. Rev. Stats. 1933, chap. 69, sec. 8). Respondents cite Guarantee Trust & Savings Bank v. Carlson, 240 Ill. App. 39, with many other similar cases, all of which are, we hold, inapplicable, for the reason that in those cases the injunction was prayed and allowed to the judgment debtor. The injunction here was not prayed for by defendant debtor, nor is it in favor of that corporation. The rule contended for is therefore not applicable, and the court might in its discretion for good cause shown dispense with any bond. Jaffe v. Hooper, 247 Ill. App. 449; Skolers v. Meyer, 246 Ill. App. 13.

This injunction order was well designed to preserve the status pending the trial of the case on the merits, and the statute under which this appeal was taken is not intended to prevent the operation of a restraining order entered under such circumstances. In McDougall Co. v. Woods, 247 Ill. App. 170, this court had occasion to give careful consideration to the construction of that statute, and while there was a difference of opinion in the court as to the merits of the then instant case, the Judges were agreed in the statement that "the primary purpose of the statute is to permit a review of the exercise of the discretion lodged in the chancellor with the purpose of determining whether the interlocutory order probably was necessary to maintain the status quo and preserve the equitable rights of the parties." To the same effect are Fitzgerald v. Christy, 242 Ill. App. 343; Friedman v. Peckler, 255 Ill. App. 203; Lincoln Trust & Savings Bank v. Nelson.

261 Ill. App. 370.

We are satisfied that the chancellor in this case exercised wise discretion in issuing the restraining order and thus preserving the trust estate and the funds in controversy until the rights of the respective parties therein might be determined. For this reason the order of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

On the other hand, the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee, and the fact that the Committee has not yet received any information from the Government of the United States regarding the activities of the Committee, are both factors which may be taken into account in determining the Commission's position on the matter.

37193

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

HARRY A. JOHNSON, EUGENE G. QUINN,
JOHN MUERLING, FRANK WARGOSKI and
JOSEPH DUFFY,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

277 I.A. 622^A

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants were charged with a conspiracy to defraud the City of Chicago, and upon trial were found guilty. Johnson and Muerling were fined \$5000 each and sentenced to the penitentiary; the other three defendants, Quinn, Wargoski and Duffy, were sentenced to one year in the county jail. Floyd Knott, also a defendant, was never apprehended or tried. Defendants seek a reversal, asserting as one point that the People unfairly tried the case against them in that it presented evidence and argued to the jury that defendants were guilty of wrongdoing not charged in the indictment and contrary to a stipulation between the parties. We are of the opinion that the point is well taken.

The controversy arises out of a contract let by the City to the Electrical Contracting Company for the installation of foundations and conduits for street lamps in Chicago. Harry A. Johnson was president and Floyd Knott vice-president of the Electrical Contracting Company, Eugene G. Quinn was chief inspector of the work for the city, John Muerling city electrical engineer in charge of the work, Frank Wargoski storekeeper, in charge of city electrical supplies, Joseph Duffy stenographer and bookkeeper, in charge of records of the city's supplies and equipment.

Originally the indictment was in three counts, the first two charging conspiracy in general terms; upon motion a bill of particulars was filed as to these counts, which, briefly stated,

THE PEOPLE OF THE STATE OF ILLINOIS,
 Defendant in Error,

vs.

HARRY A. JOHNSON, ROBERT A. JOHNSON,
 JOHN MERRILL, FRANK WARGENTHAL and
 JOSEPH DUFFY,
 Plaintiffs in Error.

ORDER TO GRANT A WRIT
 OF HABEAS CORPUS.

37193

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendants were charged with a conspiracy to defraud the City of Chicago, and upon trial were found guilty. Johnson and Merrill were fined \$500 each and sentenced to the penitentiary; the other three defendants, Quinn, Wargenthal and Duffy, were sentenced to one year in the County Jail. They must, also a fine. Johnson, was never apprehended or tried. Defendants seek a reversal, asserting as one point that the people unfairly tried the case against them in that it presented evidence not charged in the jury that defendants were guilty of conspiring not charged in the indictment and contrary to a stipulation between the parties. We are of the opinion that the point is well taken.

The controversy arises out of a contract let by the City to the Electrical Contracting Company for the installation of trolley lines and conduits for street lamps in Chicago. Harry A. Johnson was president and Floyd Gust vice-president of the Electrical Contracting Company. Eugene A. Quinn was chief inspector of the work for the city, John Merrill chief electrical engineer in charge of the work, Frank Wargenthal foreman, in charge of city electrical supplies, Joseph Duffy steamfitter and pipefitter, in charge of records of the city's supplies and equipment. Originally the indictment was in three counts, the first two charging conspiracy in general terms; upon motion a bill of particulars was filed as to these counts, which, briefly stated,

charged that defendants had defrauded the City of moneys by failing to perform the work according to the terms of the contract - that is, by "skinning" the work. During the trial counts one and two were nolle prossed; the third count, upon which the parties went to trial, charges that the defendants conspired to defraud the City of certain sums of money by permitting the contractor to do less work than that called for by the contract and at the same time paying upon the basis of the work called for by the contract.

The parties had entered into a stipulation with reference to the letting of the contract which recites the various steps leading thereto - the bids duly submitted; that the Electrical Contracting Company received the contract, which was "duly approved" by the mayor of Chicago; that subsequently a supplemental contract was made for forty-seven street lamps in other locations than those specified in the contract, and that said supplemental contract "was duly and legally entered into" by the City of Chicago and the Electrical Contracting Company.

Defendants charge that the attorney for the prosecution trying the case went beyond the charges made in the indictment and breached the stipulation as to the legal execution of the contract by introducing evidence and arguing to the jury that the contract was procured by the Electrical Contracting Company by collusion and fraud. The prosecution introduced evidence that while there were only two bidders for this contract there were about twelve other concerns in the electrical contracting business capable of handling this job, and that there was a shortage of work in this kind of business. Objection was made to this line of evidence, which was sustained, but the prosecution persisted in introducing evidence tending to show, by inference, that there was collusion prior to the letting of the contract; that this was evidenced by the fact that no estimate was made by the City of the cost of the

work. A witness was permitted to testify that he had information that there was favoritism in connection with the job. Based upon this evidence, the prosecuting attorney argued strenuously to the jury that the plans, specifications and contract were drawn by Muerling with an "inflated price," pursuant to the conspiracy.

There was in evidence that defendant Johnson and Floyd Knott had drawn certain checks aggregating \$60,000, which were charged on the books of the company to labor and expense, and later to the personal accounts of Johnson and Knott. It was argued to the jury that these checks were paid to Michael J. Kennedy, Commissioner of gas and electricity for the City, and to defendant Muerling who drew the plans and specifications for the City, for the purpose of procuring the contract for the Electrical Contracting Company.

The evidence and arguments of the prosecution should have been confined to the charge of nonperformance of the contract. It was prejudicial error to attack the letting of the contract to the Electrical Contracting Company.

An instruction given by the court tended to assist the prosecution to go outside of the indictment and the stipulation. This instruction told the jury "that if two or more persons conspire either to commit any offense against *** any *** incorporated city *** in any manner or for any purpose" the parties to the conspiracy might be punished. The court refused to give an instruction at the request of the defendants to the effect that it must be presumed that the officials of Chicago acted in a lawful manner when the original contract was entered into and must presume "that the bidding on said contract was done in the regular manner in accordance with the law." This instruction should have been given. The People v. C. B. & Q. R. R. Co., 314 Ill. 445;

It is commonplace to say that every person charged with a

work. A witness was provided to testify that he had information that there was a transaction in connection with the job. Based upon this evidence, the presiding attorney argued strenuously to the jury that the plans, specifications and contract were drawn by Knott and drawn certain contracts, dated 1914, which were charged on the books of the company to Knott and others, and later to the personal accounts of Knott and others. It was argued to the jury that these matters were said to amount to a conspiracy, a conspiracy of gas and electricity for the city, and to defendant Knott and others who were said to be conspiring for the city for the purpose of securing the contract for the electricity contracting company.

The witness and arguments of the prosecution and its have been confined to the charge of conspiracy of the contract. It was prejudicial error to allow the testimony of the contract to the electrical contracting company.

An instruction given by the court tended to assist the prosecution to go outside of the indictment and the stipulation. This instruction told the jury "that if two or more persons conspire together to commit any offense against the law, and under entered into any contract or any business" and further to the effect "agreement shall be binding. The court refused to give an instruction at the request of the defendant to the effect that it may be presumed that the stipulation of Knott and others in a contract when the original contract was entered into and that provision "that the stipulation on said contract was void in the event Knott and others were not the law." This instruction as it was given.

The People v. E. J. Knott, et al., 214 Ill. App. 445

It is so manifest to say that every person charged with a

crime is entitled to a fair and impartial trial in conformity with the laws of the state. The law will not tolerate the prosecution of the defendant for a crime which has not been charged. In McDonald v. The People, 126 Ill. 150, the conviction was reversed on the ground that evidence was admitted of a distinct act not included in the indictment or bill of particulars. In The People v. Gawlick, 350 Ill. 359, the court said: "The rule has long existed in this State, however, that proof of separate crimes wholly disconnected from the crime charged is erroneous."

We have not discussed the dictionary definitions of the words in the stipulation. It is enough to say that, taken in connection with the charge in the indictment relating to the performance of the work, it could only be understood to be a stipulation covering all the facts in connection with the letting of the contract and that it was lawfully made.

The error in this respect would affect not only the parties concerned with the procuring and letting of the contract, but also those defendants who were connected only with the work itself. All the defendants were injured by this prejudicial conduct on the part of the prosecution.

Does the evidence establish beyond a reasonable doubt that defendants were guilty of a conspiracy to defraud the City by "skinning" the work?

The contract was entered into February 11, 1931, and work was commenced almost immediately. Michael J. Kennedy was Commissioner of Gas and Electricity, in charge of the work for the City; shortly after the work was commenced Knott, vice-president of the Contracting company, complained to Muerling about the weight of the manhole forms and covers. The contract provided that the City would furnish the castings for these and also specified their weights. Knott complained that when the castings were made ac-

crime is entitled to a fair and impartial trial in conformity with the laws of the state. The law will not tolerate the prosecution of the defendant for a crime which has not been committed. In McDonald v. The People, 192 Ill. 190, the conviction was reversed on the ground that evidence was admitted of a distinct act not included in the indictment or bill of particulars. In The People v. Gwizik, 350 Ill. 388, the court said: "The law has long existed in this state, however, that proof of separate crimes wholly disconnected from the crime charged is immaterial."

We have not discussed the discretionary jurisdiction of the words in the indictment. It is enough to say that, when in connection with the charge in the indictment relating to the performance of the work, it could only be understood to be a stipulation covering all the facts in connection with the taking of the contract and that it was lawfully made.

The error in this respect could not affect the parties concerned with the prosecution and taking of the contract, but also those defendants who were charged with the work itself. All the defendants were injured by this prejudicial conduct on the part of the prosecution.

Does the evidence establish beyond a reasonable doubt that defendants were guilty of a conspiracy to defraud the City by "skimming" the profits?

The contract was entered into February 12, 1901, and was was commenced about immediately. Michael J. Kennedy was co-owner of Gas and Electricity, in charge of the work for the city; shortly after the work was commenced, Kennedy, vice-president of the Contracting Company, commenced to handling about the taking of the annual form and covers. The contract provided that the City would furnish the necessary for these and also specified their weights. Knott was present when the contract was made and

According to the patterns furnished by the City it was found that they were about 20% overweight and that the contractor expected to hold the City responsible for this and would claim extra compensation at the conclusion of the contract. The contractor was to furnish all the material, and Knott also stated that it was found necessary to use a large amount of additional two inch pipe; that in pushing pipe conduits under the street from lamp-post to lamp-post there is a great deal of breakage caused by unexpected obstructions. There was in evidence that a contractor could use as much as 500 feet of pipe in attempting to push a 30 foot lateral under the street. Knott stated that his company expected to make a claim for this extra expense, on the ground that the company could not know of the presence of these obstructions in the street. Muerling reported this to Kennedy, who told Muerling to report to Knott that under no circumstances would claims for extras be allowed.

Kennedy and Muerling had a further discussion of this matter and Kennedy testified that, having in mind "that the Department's past experience in regard to settlements of the extra claims of contractors had been quite disastrous to the Department," he told Muerling to try to work out some sort of plan whereby the contractor would assure the Department that the job would be performed and completed and no claim for extras made; Muerling told Kennedy he had been going over the plans and specifications and found that they followed a form used when the City installed thousand pound concrete lamp-posts, which provided for a foundation of forty-two inch depth; that the City in the present instance did not expect to use concrete posts, but intended to use 450 pound iron posts, which would require a concrete foundation of thirty inches in depth; that it was through inadvertence that the contract called for the old type of forty-two inch foundation. Kennedy and

according to the estimate furnished by the City it was found that they were about 200 feet long and that the contractor expected to hold the City responsible for the cost and would claim compensation at the completion of the contract. The contractor was to furnish all the material, and would also state that it was found necessary to use a large amount of additional two inch pipe; that in pushing pipe conditions under the street from lamp post to lamp-post there is a great deal of damage caused by unexpected obstructions. There was in evidence that a contractor could use as much as 500 feet of pipe in attempting to push a 10 foot lateral under the street. It was stated that the company expected to make a claim for this extra damage, on the ground that the company could not know of the presence of these obstructions in the street. Kennedy stated that he knew, who said that he was to report to the City that under no circumstances would claims for extras be allowed.

Kennedy and Fleming had a further discussion at this time for and Kennedy testified that, having in mind "that the City's past experience in regard to settlements of the extra claims of contractors had been quite disastrous to the Department," he told Fleming to try to work out some sort of plan whereby the contractor would assure the Department that the job would be performed and completed and no claim for extras made; Fleming told Kennedy he had been going over the plans and specifications and found that they followed a plan used when the City installed thousands of concrete lamp-posts, which provided for a foundation of forty-two inch feet; that the City in the present instance did not expect to use concrete posts, but intended to use iron posts, which would require a concrete foundation of thirty inches in depth; that it was Kennedy's understanding that the contract called for the use of forty-two inch foundation. Kennedy and

Kuerling then concluded to propose to the Contracting company to reduce the depth of the foundation from 42 to 30 inches in consideration of the Contracting company guaranteeing to present no claim whatsoever for extras.

The City at this time had a quantity of short length cable in storage which it had not been able to use. It was proposed, as part of the inducement to the Contracting company to refrain from claiming extras, to permit it to use so much of this short length cable as it could use if it would replace the amount so used with new, longer pieces of cable.

Knott was then requested to call upon Kennedy. At the conference which followed there was a discussion with reference to the claim for extras, Knott calling Kennedy's attention to the fact that in the past such claims had been favorably acted upon by the city council; Kennedy then said that it had been discovered that the contract called for foundations at a greater depth than necessary and that the contractor could save enough money on the change from 42 inches to 30 inches of depth to compensate the contractor for any extra expense it might incur; Kennedy also offered to allow the contractor to use part of the cable and transformers in the city storage yard provided the contractor would replace them with new material and not make any claim for extras; Kennedy told Knott that he had authority under the contract to make this change in the depth of the foundations by a provision reading as follows:

"Change in plans. Article 29. The Commissioner of Gas & Electricity reserves the right to make any change in the specifications and plans which may be deemed necessary, either before or after beginning any work under this contract, without invalidating this contract; providing that if alterations are made, the general character of the work as a whole is not changed thereby."

Knott agreed to this arrangement and the work proceeded accordingly.

Kennedy was called as the court's witness, and his version of what occurred was not contradicted. Defendants admit that they furnished a thirty inch depth foundation instead of the forty-two

Knolly then contended in process to the Contracting company to reduce the depth of the foundation from 48 to 36 inches in consideration of the Contracting company guaranteeing in present no claim whatsoever for extras.

The City at this time had a quantity of short length cable in storage which it had not been able to use. It was proposed as part of the inducement to the Contracting company to refrain from claiming extras, to permit it to use as much of this short length cable as it could use in its work to replace the material as used with new, longer pieces of cable.

Knolly was then requested to call upon Kennedy. At the conference which followed there was a discussion with reference to the claim for extras. Knolly called Kennedy's attention to the fact that in the past such claims had been favorably acted upon by the city council; Kennedy then said that it had been discovered that the contractor called for foundations at a greater depth than necessary and that the contractor would have to pay money on the change from 48 inches to 36 inches of depth; he contended the contractor for any extra expense it might incur; Kennedy also claimed to allow the contractor to use part of the cable and transformers in the city storage yard provided the contractor would replace them with new material and not make any claim for extras; Kennedy told Knolly that he had authority under the contract to make any change in the depth of the foundations by a provision reading as follows:

"Change in plan, Article IV. The Government of the City of New York reserves the right to make any change in the specifications and plans which may be deemed necessary, without notice or other penalty, and any work under this contract, without investigation, this contract, providing that no alterations are made, the General character of the work as a whole is not changed thereby."

Knolly agreed to this arrangement and the work proceeded accordingly.

Kennedy was called as the court's witness, and his version of what occurred was not contradicted. He testified that Knolly furnished a thirty inch depth foundation instead of the forty-two

inch called for by the contract, and say that this was done pursuant to the arrangement with the head of the city department having the matter in charge, and was entirely free from any fraudulent purpose.

A number of witnesses on behalf of the prosecution testified that, in their opinion, under the contract no claim could be allowed to the contractor for extras. The defendants attempted to prove that as a matter of fact it had been usual for the city council to allow for such extras in other like contracts, but objection to this line of evidence was sustained. This ruling was error; the evidence bore on the probability of the arrangement with Kennedy.

Pursuant to the agreement to reduce these foundations, Bright, a city inspector who had charge of inspecting the holes into which the concrete foundations were to be poured, was given instructions to reduce the depth of these foundations to thirty inches. All of the foundations inspected by him were of this depth. Bright seems to have been a competent man, employed by the City for many years. It is also in evidence that the Contracting company never made any claims for extras.

The prosecution charged that the contractor unlawfully took certain cables and transformers from the city storage yard and used them in the work. This city material yard was under the general supervision of the defendant Muerling, who was a party to the arrangement permitting the contractor to use such material. Defendant Duffy was a subordinate clerk assigned to the city material yard, where he kept the records. Defendant Wargoski acted in the capacity of storekeeper. Knott instructed one Schiffauer, in the hauling and trucking business, to go to this yard and obtain some of this material which he did. Every time any material was taken from the yard Schiffauer signed a receipt therefor, which receipts were written by Wargoski and are in possession of the City as city records. Duffy recorded these transactions in the yard stock book. There

then called for by the contract, and say that this was done pursuant to the arrangement with the head of the city department having the matter in charge, and was entirely free from any fraudulent purpose. A number of witnesses on behalf of the prosecution testified that, in their opinion, under the circumstances no claim could be allowed to the contractor for extras. The defendants attempted to prove that as a matter of fact it had been agreed for the city council to allow for each extra in other like contracts, but objection to this line of evidence was sustained. This ruling was correct; the evidence bore on the probability of the arrangement with Kennedy.

Pursuant to the agreement to reduce these foundations, Bright, a city inspector who had charge of inspecting the wells into which the concrete foundations were to be poured, was given instructions to reduce the depth of these foundations to thirty inches. All of the foundations inspected by him were of this depth. Bright seems to have been a competent man, employed by the city for many years. It is also in evidence that the contracting company never made any claims for extras.

The prosecution suggests that the contractors unlawfully took certain cables and standards from the city storage yard and used them in the work. This city material yard was under the general supervision of the defendant, Schiltner, who was a party to the arrangement permitting the contractor to use same material. Defendant daily was a superintendent of work assigned to the city material yard where he kept the records. Defendant Vargosi acted in the capacity of storekeeper. Bright inspected the Schiltner, in the handling and trucking material, to see to this yard and obtain some of this material which he did. Every time any material was taken from the yard Schiltner signed a receipt therefor, which receipts were written by Vargosi and are in possession of the city as city records. Daily recorded these transactions in the yard stock book. There

is evidence that the contractor returned an amount of new material although there was some controversy over an alleged discrepancy between the amount taken and the amount returned by the contractor.

During the progress of the work Kennedy ceased to be Commissioner of Gas and Electricity and his duties for a short time were taken over by Francis M. O'Donnell. July 1, 1931, O'Donnell certified to the city comptroller that the contractor had satisfactorily completed 61% of the work.

July 10, 1931, William A. Jackson assumed the office of Commissioner of Gas and Electricity. Mr. Jackson was an experienced electrical contractor. He testified that when he took office he had heard gossip to the effect that the job was being "skinned." Muerling wrote to Jackson stating in detail the arrangement under which the contractor was using old material that belonged to the City, stating the amount that had been so used and the amount of new material that had been returned. Jackson was informed by representatives of the Citizens' Association of the fact that the depths of the foundations had been changed from 42 inches to 30 inches. An investigation was made for Jackson, who testified that he then consulted the corporation counsel's office as to whether he should make further payments on the contract; that he informed some one in the corporation counsel's office of the supposed defects in the work and was advised that despite these alleged defects he should make final payments and should certify that the job was "100% satisfactory."

As to the alleged defects the evidence shows that of 212 foundations selected at random the average depth was 30-11/100 inches. There was also evidence that some foundations were less than 30 inches.

The specifications called for metal templates, which are molds holding the concrete until it has hardened. An investigator for the Citizens' Association testified that wooden templates were

[illegible][illegible][illegible]

used. It is in evidence that it is cheaper to use metal than wooden templates. This investigator did not testify as to templates he saw but simply says that there was no evidence that any metal templates were used. It is hardly credible that the contractor would use a more costly template than the kind called for by the contract.

Another alleged defect is the lack of grouting, which is a layer of concrete placed upon the top of the foundation after the iron light posts have been bolted. It is admitted that no grouting was placed on the posts. Jackson knew of this omission at the time he certified that the job was satisfactory. The defense offered to prove that experience had shown that it was better work not to place grouting on lamp-posts; that of 600 light posts erected by the City itself at this time, under the same specifications as in the instant case, the City did not grout any of the posts because of the high cost of maintenance of grouted posts. It is in evidence that grouting all the posts would cost about \$2400.

Commissioner Jackson testified that the saving to the contractor by the shortening of foundations and lack of grouting was \$17,250. Kennedy placed the saving at \$10,350. There was other testimony of a larger amount.

It was also in evidence that in a contract of this kind there were always certain differences or deficiencies against which the City protected itself by requiring bonds from the contractor.

Article 26 of the contract provides that if it should appear that the City has made any illegal or excess payments to the contractor, it agrees to repay the same on demand. When the contract was entered into the contractor gave a performance bond of \$531,683, with sufficient surety, providing for the performance of the contract in accordance with its terms and its specifications, and conditioned upon the repayment to the City of any illegal or

used. It is in evidence that it is known to the metal than wooden lath. This contractor did not testify as to whether he saw any lath and there was no evidence that any metal lath were used. It is fairly credible that the contractor would use a more costly lath than the kind called for by the contract.

Another alleged defect in the work of Graceland, which is a layer of concrete placed upon the top of the foundation after the iron light posts have been poured. It is admitted that no proofing was placed on the posts. Jackson knew of this omission at the time he testified that the job was satisfactory. The defense offered to prove that experience had shown that it was better work not to place proofing on light-posts; that of 100 light posts erected by the City itself at this time, under the same specifications as in the instant case, the City did not find any of the posts because of the high cost of maintenance of painted posts. It is in evidence that proofing all the posts would cost about \$2400.

Commissioner Jackson testified that the saving to the contractor by the shortening of foundations and lack of proofing was \$17,250. Kennedy placed the saving at \$10,250. There was other testimony of a larger amount.

It was also in evidence that in a contract of this kind there were always certain firmness or ballastures against which the City protected itself by retaining bonds from the contractor. Article 26 of the contract provides that it is agreed between that the City has made any liability or excess payment to the contractor, it agrees to repay the same on demand. When the contract was entered into the contractor gave a performance bond of \$25,000, with sufficient surety, providing for the performance of the contract in accordance with the terms and its specifications, and conditioned upon the repayment to the City of any liability or

excess payment. Upon the completion of the work the contractor, as called for by the contract, furnished the City with a maintenance bond in the amount of \$21,267.30. Under its provisions the City was protected against any defects of material or workmanship for the period of one year from the date of the completion of the contract. Defendants point out that no claim or demand has been made by the City on this contractor for the return of any excess or illegal payments although new city officials have been in charge. It is in evidence that the Contracting company by Johnson, its president, drew certain checks, two for \$10,000 each to the order of E. J. Welch, Jr., the paymaster of the company, and other checks for \$15,000 and \$25,000 respectively, payable to cash and endorsed by Johnson. These checks aggregated \$60,000. It is admitted they were paid through the bank account of the contractor and were charged on its books against the expense and labor accounts, but later were charged to the individual accounts of Johnson and of Knott. The prosecution stated to the jury that the proceeds of these checks were used by Johnson to bribe Kennedy to award the contract to the Electrical Contracting Company. If this were true, why was not Kennedy indicted? As we have already said, such a statement was highly prejudicial, as the procuring of the contract was not an issue in the case.

Furthermore, there was no evidence that the proceeds of these checks were paid to Kennedy or to anyone connected with the City. In the absence of any evidence connecting these checks with any of the city officials they should have been excluded. In Henton v. U. S., 280 Fed. 697, it was held evidence that a hotel keeper had drawn and cashed his own check for \$1000 was inadmissible in the absence of evidence to connect it with the alleged bribe taker. Other cases supporting this rule are People v. Bissert, 172 N. Y. 643, affirming 71 App. Div. 118; The People v.

excess payment. Upon the completion of the work the contractor, as called for by the contract, furnished the City with a maintenance bond in the amount of \$21,000.00. Under the provisions the City was protected against any defects of material or workmanship for the period of one year from the date of the completion of the contract. Defendants point out that no claim of breach has been made by the City on this contract for the return of any excess or illegal payments although new city officials have been in charge. It is in evidence that the Continental Company, by Johnson, its president, drew certain checks, two for \$1,000.00 each, to the order of J. J. Wilson, Jr., the president of the company, and other checks for \$10,000 and \$25,000 respectively, payable to cash and endorsed by Johnson. These checks represented \$35,000. It is admitted they were paid through the bank account of the contractor and were charged on the books against the company and labor accounts, but later were charged to the individual accounts of Johnson and of others. The prosecution argued to the jury that the proceeds of these checks were used by Johnson to finance the work of the contractor to the Electrical Contracting Company. It was further argued that the checks were not lawfully issued, as they were drawn on a statement was highly prejudicial to the interests of the contractor was not in issue in this case.

Furthermore, there was no evidence that the proceeds of these checks were paid to Kennedy or to anyone connected with the City. In the absence of any witness connecting these checks with any of the city officials, they would have been considered, in Horton v. U. S., 200 Fed. 237, it was held evidence that a hotel keeper had drawn and cashed his own check for \$1000 was inadmissible in the absence of evidence to connect it with the illegal bribe later. Other cases supporting this rule are People v. Blazey, 178 N. Y. 424, affirming 71 App. Div. 118; People v.

Coffey, 161 Cal. 433, and Williams v. U. S., 168 U. S. 382.

There was evidence from which the jury could properly believe that the contractor, through Johnson, paid defendants Muerling, Quinn, Duffy and Wargoski various small sums of money. These men were described by the prosecuting attorney as the "small fry." It is argued that this money was paid to them to procure their approval of the reduction in the depth of the foundations. It is doubtful whether the evidence shows the money was paid for this purpose. The authority to the contractor to reduce the foundations came from Kennedy, the head of the Department.

Duffy and Wargoski were employed in the storage yard, and it is argued that they received bribes to permit the contractor to take cable and material. Again, the authority to take this material came from the head office. While these comparatively small amounts might have been paid to these "small fry" defendants to secure their favor, which should be condemned, yet there is lack of any evidence connecting anything they did with the conspiracy charged. There was no secrecy about either the reduced depths of the foundations or the omission of grouting, and records were kept by the City of the amount of material taken by the contractor and of the new material returned by it. If there is a loss to the City because of any discrepancies either in work or materials, the City is amply protected (1st) by the fifteen per cent of the contract price, or \$160,000, retained by the City, as provided by the contract, to protect itself against any deficiency in the performance of the work, and (2nd) the bonds given by the contractor to the City aggregating considerably over \$500,000, to secure the proper performance of the work.

The record may produce very strong suspicion of wrongdoing, but this is not sufficient to justify a verdict of guilty. Where a conviction is based upon unsatisfactory evidence which fails to

prove the guilt of the defendant beyond all reasonable doubt, it is the duty of the reviewing court to reverse the judgment. The People v. Elmore, 318 Ill. 276; The People v. Venon, 340 Ill. 511.

At the suggestion of the State's attorney the court called Michael J. Kennedy as a witness and after a few questions he was turned over for cross-examination. Under the circumstances this was not prejudicial error. Certainly the defendants were not harmed by Kennedy's testimony, and the record shows that their counsel stated in his argument to the jury that he would have called Kennedy as a witness if he had not been otherwise called.

Defendant Johnson had voluntarily turned over all his records with check books to an investigator, to be used before the grand jury. Defendants requested the court to instruct the jury that Johnson had a constitutional right to refuse to turn over to the prosecution these books, records and papers. The instruction should have been given. It is well established that a witness has a right to refuse to furnish evidence which will incriminate himself. Manning v. Securities Co., 242 Ill. 584.

A witness testified that he had not been able to locate Knott, vice-president of the Contracting company. From this the prosecution argued to the jury that Knott had disappeared. The defense asked the court to instruct the jury to disregard the evidence and argument concerning the alleged flight of Knott. The fact that he was not found shed no light on the question of the guilt of the defendants. Reference to the flight of a co-defendant has been held error, and the instruction should have been given. The People v. Blumenberg, 271 Ill. 180.

None of the defendants testified. In its argument to the jury the prosecution referred to "one man defense," the "whole defense is Mr. Kennedy's story," and "this one man defense" - by Mr. Kennedy. The record shows that five witnesses testified on behalf of defendants, with exhibits. Indirect and covert

prove the guilt of the defendant beyond all reasonable doubt, it is the duty of the reviewing court to reverse the judgment. People v. Simon, 314 Ill. 575; People v. Vane, 345 Ill. 511.

At the suggestion of the state's attorney the court called Michael J. Kennedy as a witness and after a few questions he was turned over for cross-examination. Under the direct examination was not prejudicial error. Certainly the statements were not harmed by Kennedy's testimony, and the record shows that the counsel stated in his argument to the jury that he would have called Kennedy as a witness if he had not been otherwise called. Defendant Johnson had voluntarily turned over all his

records with check books to an investigator, so he need before the grand jury. Defendant's request that the court instruct the jury that Johnson had a constitutional right to refuse to turn over to the prosecution these books, records and papers. The instruction should have been given. It is well established that a witness has a right to refuse to furnish evidence which will incriminate himself. People v. McQuinn, 345 Ill. 534.

A witness testified that he had not been able to locate Robert, vice-president of the contracting company. This was the prosecution's only evidence that the jury had heard and discussed. The defense asked the court to instruct the jury to disregard the evidence and argument concerning the alleged flight of Smith. The fact that he was not found was not a part of the case or the guilt of the defendant. It tends to show flight of a co-defendant has been held error, and the instruction would have been given.

The People v. Zimmerman, 311 Ill. 160.

None of the defendant testified. In his argument to the jury the prosecution referred to "one man defendant," the whole defense is Mr. Kennedy's story, and "this one man defense" - by Mr. Kennedy. The record shows that five witnesses testified on behalf of defendant, with exhibits, indirect and overt

references to the failure of the defendants to testify may be as prejudicial to their rights as a direct comment upon their failure to testify. Watt v. The People, 126 Ill. 9; The People v. Annis, 261 Ill. 157; chap. 38, par. 758, Illinois Statutes (Cahill) 1933. The comments of the prosecution ^{are} dangerously near, if not altogether over, the prejudicial line.

There have been two trials of this case. Defendants sought to show that at the first trial the jury stood eleven to one for acquittal. The court properly excluded this evidence.

One of the main theories of the prosecution was that one of the objects of the conspiracy was to permit "improper and inadequate concrete foundations to be placed under the lighting posts" and to allow the contractor to omit "the grouting required by said plans and specifications." The defendants sought to show that the foundations were adequate and the work in general good. The court did not permit defendants to go into this subject. A criminal conspiracy was charged against defendants and the evidence as to whether it was a good or a bad job was material although such evidence might not have been material in a civil action for breach of the contract. In Looney v. The People, 81 Ill. App. 370, the contractor used Milwaukee cement instead of Portland cement, called for by the contract; the contracting parties were indicted and charged with conspiring to defraud the City of Rock Island; the defendants attempted to show that the Milwaukee cement they used was as good as the Portland cement. The court held that if the contractor used Milwaukee cement he committed a breach of the contract, but that this was a criminal action, and that one of the material questions was whether the parties intended to defraud the City, and upon that question the merits of Milwaukee cement were material, and that if the evidence showed that Milwaukee cement was just as good and as useful to the City as Portland cement, that fact would

have a strong bearing upon the question of intent. In the instant case a witness for the People testified that the system installed by defendants was operating as well as all the rest of the street lighting systems. Defendants should have been permitted to develop this phase of the matter.

We are of the opinion that prejudicial errors were committed which deprived defendants of a fair trial; also, that the evidence of the existence of the conspiracy charged in the indictment is unsatisfactory.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Matchett, J., concur.

have a strong bearing upon the position of letters. In the present case a witness for the Government testified that the system installed by the defendant was operating as well as all the rest of the night lighting system. Defendant's Exhibit B has been permitted to develop this phase of the matter.

In one of the opinions that prejudicial errors were committed which involved statements of a fact issue; that, when the evidence of the defendant in the conspiracy charged in the indictment is unavailing.

For the reasons indicated and indicated is reversed and the case remanded.

REVEREND AND RESPECTED,

O'Connor, W. J., and Bennett, J., concur.

37635

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,
vs.
SALLY RAND,
Plaintiff in Error.

774
ERROR TO MUNICIPAL COURT
OF CHICAGO.

277 I.A. 623¹

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Defendant was charged with giving an indecent performance and dancing exhibition in the Chicago theatre, and upon trial by jury was found guilty and sentenced to imprisonment in the House of Correction for ten days and the payment of a fine of \$200.

Witnesses gave testimony tending to support the charges in the information, but other witnesses gave testimony to the contrary. Much of the testimony of the witnesses on behalf of the prosecution is improbable and unsatisfactory.

While the weight of the evidence is for the jury to determine, yet where the evidence is so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt, this court should reverse the judgment. The People v. Vehon, 340 Ill. 511.

The judgment of the Municipal court is reversed.

REVERSED.

O'Connor, P. J., and Matchett, J., concur.

277 I.A. 623

CHIEF OF MUNICIPAL COURT

OF CHICAGO.

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

vs.

EARLY LAND,
Plaintiff in Error.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Defendant was charged with giving an indecent performance and dancing exhibition in the Chicago Theater, and upon trial by jury was found guilty and sentenced to imprisonment in the House of Correction for ten days and the payment of a fine of \$500.

Witnesses gave testimony tending to support the charges in the information, but other witnesses gave testimony to the contrary. Much of the testimony of the witnesses on behalf of the prosecution is improbable and难以置信.

While the weight of the evidence is for the jury to determine, yet where the evidence is so untrustworthy, improbable or难以置信 as to justify a reasonable doubt of defendant's guilt, this court should reverse the judgment. The People v. Logan.

340 Ill. 511.

The judgment of the trial court is reversed.

REVEREND.

O'Connor, M. J., and Macgregor, J., concur.

37664

MARY OWCZARZAK, as Executrix of the
Estate of PAULINA ROPACKI, Deceased,
Appellee,

vs.

WALTER ROPACKI, SOPHIA ROPACKI,
LAWRENCE JARNUSZYNSKI and ANNA
JARNUSZYNSKI,

Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

277 I.A. 623²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit upon a supersedeas bond, in which Walter Ropacki and Sophia Ropacki were principals and Lawrence Jarnuszynski and Anna Jarnuszynski were sureties. Defendants filed a second amended affidavit of merits which, upon motion, was stricken by the court with leave to file a further amended affidavit of merits within five days; defendants elected to stand by their second amended affidavit and default was entered against them; evidence was heard by a jury, which returned a verdict for plaintiff for \$972.13; defendants appeal from the judgment on the verdict.

The bond was in the penal sum of \$2500 and recites that Walter and Sophia Ropacki sued out a writ of error from the Supreme court, which was made a supersedeas upon filing this bond. The obligation was conditioned upon the prosecution of the writ of error with effect, and in case the decree of the Circuit court, which was the subject matter of the writ of error, should be affirmed in the Supreme court, that Walter and Sophia Ropacki should pay to Paulina Ropacki all damages sustained by her on account of the writ of error being made a supersedeas.

The statement of claim alleged that upon giving said bond, Walter and Sophia Ropacki with force of arms entered into and seized possession of the premises and excluded plaintiff therefrom; that plaintiff thereupon notified all the defendants that the rents and damages to be paid for the wrongful seizing and taking possession

WALTER ROBERTS, MORTIMER ROBERTS,
LAWSON ROBERTS, MORTIMER ROBERTS,
LAWSON ROBERTS, MORTIMER ROBERTS,

1. 11. 1944

[illegible][illegible]

changes to be made for the strength of the line and taking possession of the territory covered in the agreement with the same and possession of the territory and exclusive right of navigation; that water and power should with force of arms be taken into and retained, and the right of the United States to the same should be secured.

of the premises was \$75 a month for the use and occupation of the second flat and \$125 damages for seizing and taking possession of other parts of the premises and collecting rents therefrom; that the Supreme court affirmed the decree and quashed the supersedeas and directed Walter and Sophia Ropacki to restore possession of the premises to the plaintiff, which they subsequently did; that during the time between October 26, 1932, the date of the supersedeas bond, and May 2, 1933, Walter and Sophia Ropacki exercised dominion over the premises, were in possession thereof and collected the rents, issues and profits therefrom, damaging plaintiff by the loss of rents and by mental distress in the sum of \$1400.

The statement alleges that Paulina Ropacki died May 20, 1933, and Mary Cwczarzak was appointed and qualified as executrix under her will; that letters have been issued to her, and suit is brought by said executrix to recover the damages aforesaid.

The stricken second amended affidavit of merits admits the proceedings in the Circuit court awarding Paulina Ropacki sole right to possession of the premises and to collect the rents so long as she shall live, without interference from Walter and Sophia Ropacki; that the writ of error was made a supersedeas by the Supreme court upon filing a bond, which was duly filed; denies that they seized possession of the premises and asserts that they had been in possession of the same during the pendency of the proceedings in the Circuit court; it alleges that Walter and Sophia Ropacki were possessed at the time of the entry of the decree of an estate in the premises as remaindermen, entitled to the fee upon the death of Paulina Ropacki, and that, as such remaindermen they had the right to pay taxes, interest on mortgages, water bills, and other items that would tend to become a charge upon the property in the event of the life tenant's failure to pay the same, and that during the time that defendants were in possession the life tenant, the

plaintiff, failed to make any such payments.

The affidavit further alleged that Walter and Sophia Ropacki out of their own funds paid general tax bills against the property and also water taxes and a sum for repairs; they assert that the fair and reasonable value of the rents of the premises during their possession was \$321 and that defendants, the Ropackis, had expended that much and more for the upkeep of the property, taxes, etc., and therefore defendants having paid these amounts are not indebted to the plaintiff.

One of the principal points made by the affidavit of merits is that the defendants, as remaindermen, had the right to pay the taxes, interest on mortgage, water bills, etc., in the event of the life tenant's failure to pay the same, and that they paid the same upon her failure to do so. There is no showing that there was a duty upon the plaintiff, the life tenant, to pay these items. Her rights were fixed by the decree of the Circuit court, but defendants do not allege what her rights were under that decree. No facts are set forth showing any obligation upon plaintiff to pay any of the items and charges while these defendants were in possession.

There is no showing of any obligation on plaintiff to pay the water taxes or for repairs of the premises. As long as Walter and Sophia Ropacki were in possession they were obligated to pay the water taxes and keep the premises in repair.

Another point made is that plaintiff had no right to fix the rental value of the property at \$75 a month for the use and occupation of the second flat and \$125 a month for possession of other parts of the building. The affidavit does not deny that plaintiff notified defendants that if they continued in possession the rent and damages would be at the rate of \$200 a month. They were in possession of the premises under the supersedeas writ for six months and four days. Plaintiff, by the decree of the Circuit

plaintiff, failed to make any such payment.

The plaintiff further alleged that after the

defendant had been paid the sum of \$100,000, the

defendant and the plaintiff entered into a

contract whereby the plaintiff agreed to

pay the defendant the sum of \$100,000, the

defendant agreed to pay the plaintiff the

sum of \$100,000, and the plaintiff agreed

to pay the defendant the sum of \$100,000.

One of the principal points made by the plaintiff in its

plea was that the defendant, in violation of the

contract, failed to pay the plaintiff the

sum of \$100,000, and that the plaintiff

was entitled to recover the sum of \$100,000

from the defendant, the plaintiff, to pay the

sum of \$100,000, the plaintiff, the defendant,

the plaintiff, the defendant, the plaintiff,

the plaintiff, the defendant, the plaintiff,

the plaintiff, the defendant, the plaintiff,

there is no showing of any obligation on plaintiff to

pay the sum of \$100,000 to the plaintiff. As long as

the plaintiff is in possession of the sum of \$100,000

to pay the sum of \$100,000 to the plaintiff in

the sum of \$100,000 to the plaintiff in

the sum of \$100,000 to the plaintiff in

the sum of \$100,000 to the plaintiff in

the sum of \$100,000 to the plaintiff in

the sum of \$100,000 to the plaintiff in

the sum of \$100,000 to the plaintiff in

the sum of \$100,000 to the plaintiff in

the sum of \$100,000 to the plaintiff in

court, was given sole possession of the premises with the right to select her tenants and collect the rent. This gave her the right to fix the amount of rent to be paid by anyone else who might occupy the same. Where a landlord definitely states the terms upon which he will permit a tenant to remain in possession and the tenant continues in possession thereafter, he is bound to pay the rent upon the terms stated by the landlord. Sherriff v. Kromer, 232 Ill. App. 539, and cases there cited.

Defendants admit that this is the rule where the relation of landlord and tenant exists but say that under the instant circumstances plaintiff is entitled only to the value of the use of the premises.

By the decree of the Circuit court entered June 8, 1932, Paulina Ropacki was given sole right of possession; the defendants had the option of moving out or remaining upon the terms named by plaintiff; they chose to remain, giving a bond conditioned upon paying all costs and damages. This supersedeas did not annul the decree but simply suspended further action thereon by the Circuit court. When plaintiff notified the Ropacki defendants that if they remained the rent and damages for use and occupation would be \$200 a month they did not object to this but remained in possession, thereby becoming her tenants until the Supreme court should decide otherwise. There is point in the suggestion that the Supreme court anticipated such damages when it fixed the supersedeas bond at \$2500.

Under the new Practice act, chap. 110, par. 166, Illinois Statutes (Cahill) 1933, a counterclaim must be so designated, and must be pleaded in the same manner and with the same particularity as a complaint and must be complete in itself. The affidavit of merits filed January 26, 1934, did not properly set forth any counterclaim and judgment will not be set aside merely to enable

a defendant to maintain a cross action. Koshler v. Glann, 169 Ill. App. 537; Levinson v. Pieser, 192 Ill. App. 60.

A further point is made in support of the judgment, that if defendants have any counterclaim against Paulina Ropacki they should present their claim to the Probate court for classification and allowance.

A reading of the opinion in Ropacki v. Ropacki, 354 Ill. 502, shows that the premises in question was improved with a frame cottage and a brick two-story apartment building; that it was occupied by Paulina Ropacki and her two tenants; that by forcible detainer suits Walter and Sophia Ropacki sought to terminate her possession of the premises; that they brought forcible detainer suits against her tenants; that they took title to the premises with notice of her rights and refused to assume the burdens which the acquisition of the possession imposed. It would seem that taxes, water rents and repairs were some of the burdens that the defendants, the Ropackis, assumed.

The jury heard evidence on the question of damages and allowed an amount substantially less than claimed. The evidence has not been preserved so we must assume that the amount allowed was justified by the evidence.

We see no convincing reason to disturb the judgment, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

... FBI ...

. 0 . 694 . 117 - 886 (1 . 0) = 100 / 75 : 753 . 704

Downloaded from <http://ajphaphysiol.physiology.org/> at University of California, San Diego on June 11, 2015

1990. *Journal of the American Statistical Association*, 85(412), 1073-1081.

1953-1954 101 1000 10000 100000 1000000 10000000 100000000 1000000000

Acetivolia 8 m

18. The following are the names of the persons who have been appointed as members of the committee:

100-443887-101

the acquisition of the language.

100-443887-1000

1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 26

10-11-68

... 501'Yit'at 327

Page 177, 81. 31

1. The first group of people who are not allowed to enter the country are those who are not citizens of the United States.

37675

FRANK SCARDINA,
Appellee,

vs.

LITSINGER MOTOR COMPANY,
a Corporation,
Appellant.

73
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

277 I.A. 623³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit for malicious prosecution and upon trial by the court without a jury had judgment for \$250, from which defendant appeals. The plaintiff does not appear in this court to uphold the judgment.

The facts require a reversal. In August, 1930, a man named Frank Scardina, not the plaintiff, bought a new car from defendant, trading in another car which it later developed had been stolen; a search was made for this Frank Scardina at the address given by him but he could not be located there; it was learned that there was a person by the name of Frank Scardina living at the address of the plaintiff; an employee of the defendant went to the police headquarters and stated to the warrant clerk that they were looking for a man by the name of Frank Scardina who had turned in a stolen car in part payment for a new car and the warrant clerk was asked to make inquiry at the address of the plaintiff as to whether he was the one who had purchased the car from defendant, and if so, to arrest him; the warrant clerk agreed to this and the defendant's employee swore to the complaint.

Four policemen in plain clothes then went to the home of plaintiff; Mr. Scardina was not at home; the officers told Mrs. Scardina they wanted to see him/

When Scardina returned home he was told by his wife that police officers had been looking for him; he called up the police station and told the desk sergeant that there must be some mistake;

277 L.A. 623
 OF GOOD CONDUCT
 CIVIL SERVICE COMMISSION
 1935

37378
 KRAMER, GEORGINA,
 vs.
 LITZEN MOTOR COMPANY,
 a Corporation.
 Appealment.

MR. JUSTICE ROBERTSON delivered the opinion of the court.

Plaintiff brought suit for malicious prosecution and upon
 trial by the court without a jury and judgment for \$250, from
 which defendant appeals. The plaintiff does not appear in this
 court to uphold the judgment.
 The facts require a reversal. In August, 1935, a man
 named Frank Geardine, not the plaintiff, bought a new car from
 defendant, trading in another car which at later developed had been
 stolen; a search was made for this Frank Geardine at the address
 given by him but he could not be located there; it was learned
 that there was a person by the name of Frank Geardine living at the
 address of the plaintiff; an employee of the defendant went to the
 police headquarters and stated to the warrant clerk that they were
 looking for a man by the name of Frank Geardine who had turned in
 a stolen car in past payment for a new car and the warrant clerk
 was asked to make inquiry at the address of the plaintiff as to
 whether he was the one who had purchased the car from defendant,
 and if so, to arrest him; the warrant clerk agreed to this and
 the defendant's employee wrote to the complainant.
 Your policeman in this instance took him to the house of
 plaintiff; Mr. Geardine was not at home; the officers told Mrs.
 Geardine they wanted to see him.
 Frank Geardine returned home he was told by his wife that
 police officers had been looking for him; he called up the police
 station and told the desk sergeant that there was no such person;

he was asked if his name was Frank Scardina and he answered that it was.

Scardina then went to the Gale avenue station with a bondsman and told the desk sergeant that he was Frank Scardina and the sergeant, examining the warrant book, found a warrant for him and told him the amount of the bond, made out the necessary papers, the bond was executed and Scardina departed.

When the case was called for trial it appeared that Frank Scardina, the plaintiff, was not the person whom defendant sought and the case was dismissed at the request of the complaining witness.

Scardina testified that he was kept in the Gale avenue police station from the afternoon of June 10th until the next morning; that he was kept in a room that had cement floors and bars on the windows.

This testimony was contradicted by the testimony of the desk sergeant who stated that Scardina did not come to the station until the afternoon of June 14th; that the bond was immediately executed and he departed without having been placed in custody. This testimony is supported by entries in the arrest book and in the bond book, which show the execution of the bond at three o'clock p. m., on June 14th, and his immediate discharge at the same hour. Further testimony tending to contradict that of the plaintiff was given, to the effect that there were no cells in the Gale avenue station, nor bars at the windows, and no cement floors there. Two police officers also testified that Scardina was not detained. It was amply proven that Scardina was not incarcerated but was discharged immediately upon the execution of his bond.

The circumstances fail to show any malice on the part of the defendant in the transaction. It was seeking a man who had defrauded it by turning in a stolen car as part payment for a new one; the name of this man was the same as that of plaintiff; the

He was asked if his name was Frank Goetz and he answered that it was.

Goetz then went to the city police station with a female and told the desk sergeant that he was Frank Goetz and the sergeant, examining the warrant book, found a warrant for him and told him the amount of the bond, which was the necessary papers, the bond was executed and Goetz was released.

When the case was called for trial it was found that Frank Goetz, the defendant, was not the same person whom defendant saw at the trial and the case was dismissed at the request of the prosecuting attorney. Goetz testified that he was kept in the city police station from the afternoon of June 1933 until the next morning; that he was kept in a room that had several floors and bars on the windows.

This testimony was contradicted by the testimony of the desk sergeant who stated that Goetz did not come to the station until the afternoon of June 1933; that the bond was immediately executed and he departed without having been placed in custody. This testimony is supported by entries in the arrest book and in the bond book, which show the execution of the bond of Frank Goetz, p. m., on June 1933, and his immediate discharge at the same time. Further testimony tending to corroborate that of the defendant was given, to the effect that there were no cells in the city police station, nor bars on the windows, and no cement floors. Two police officers also testified that Goetz was not released. It was again proven that Goetz was not incarcerated but was immediately released upon the execution of his bond.

The circumstances fail to show any collusion on the part of the defendant in the transaction. It was found that a man who had defrauded it by turning in a stolen car as paid for a new one; the name of this man was the same as that of defendant; the

acts of defendant were directed only to identifying plaintiff with the man who had defrauded it; when it was shown that plaintiff was not the man the case was dismissed on defendant's motion. It is well established that malice is essential to the maintenance of the action of malicious prosecution. Harpham v. Whitney, 77 Ill. 32.

At most there was merely a mistake resulting from the identity of names. Defendant's employee had instructed the warrant clerk to inquire as to whether the Frank Scardina at plaintiff's address was the man who had purchased a car from defendant, and the instruction to arrest him was conditioned upon ascertaining that he was the same man. Plaintiff voluntarily called at the police station.

The evidence shows a complete lack of any malice on the part of the defendant, and the judgment is therefore reversed without remanding.

REVERSED.

O'Connor, P. J., and Matchett, J., concur.

[illegible]

25

[illegible]

THE FOLLOWING INFORMATION IS FOR YOUR INFORMATION ONLY AND IS NOT TO BE USED FOR ANY OTHER PURPOSE.

... ..

37802

CATHERINE MILLER,
Appellee,

vs.

HENRY LEVY, Doing Business
as LEVY EXCHANGE,
Appellant.

74
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

277 I.A. 623⁴

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff while on the premises of defendant was injured; she brought suit and upon trial by the court had judgment for \$350, from which defendant appeals.

Plaintiff, accompanied by her son, visited the automobile sales room of the defendant for the purpose of purchasing an automobile; she made a selection and while waiting for her husband to come to consummate the purchase she was invited by defendant's salesman to have a seat; she sat down in the only chair in the salesroom; she at once fell and was thrown upon the floor and against a steam radiator, receiving injuries. Both the plaintiff and her son testified that one of the legs of the chair was missing, which caused it to fall over.

Defendant argues that the law does not make him an insurer of all persons upon the premises, and this may be conceded; but when premises are shown to be under the management of the defendant or his servants and an accident happens to a customer through want of ordinary care on the part of the defendant, such defendant is liable. Hart v. Washington Park Club, 157 Ill. 9.

Defendant's testimony tended to show that the chair was not broken, but the trial court saw and heard the witnesses and could properly accept the plaintiff's version that the chair had only three legs.

Defendant argues that there is no evidence that he was negligent as it does not appear that he knew that the chair had

STANLEY WILSON,
Defendant.

vs.

HEAVY LIFT, Local Business,
as a V.I. BUSINESS,
Appellant.

2 Y. I. A. 323

MR. JUSTICE ROBERTSON delivered the following opinion:

Plaintiff, while on the premises of defendant was injured; she brought suit and upon trial by the court was awarded damages from which defendant appeals.

Plaintiff, accompanied by her son, visited the defendant's sales room of the defendant for the purpose of purchasing an article; she made a selection and while waiting for her husband to come to communicate the purchase she was invited by defendant's waitress to have a seat; she sat down in the only chair in the sales room; she at once fell and was thrown upon the floor and against a steam radiator, receiving injuries. Both the plaintiff and her son testified that one of the legs of the chair was missing, which caused it to fall over.

Defendant argues that she has good cause for her recovery of all persons upon the premises, and this may be conceded; but what premises are shown to be under the management of the defendant and her servants and an accident occurred in a common hallway and at ordinary care on the part of the defendant, such defendant is liable. Hart v. Washington City, 187 Ill. 2.

Defendant's testimony tended to show that the chair was not broken, but the trial court was not bound by defendant's evidence and properly accepted the plaintiff's version that the chair had only three legs.

Defendant argues that there is no evidence that she was negligent as it does not appear that she knew that the chair had

only three legs. When plaintiff fell defendant's salesman inquired as to who had brought "that three legged chair out" and said he would order it removed. This would indicate knowledge by defendant's servant of the condition of the chair. This salesman did not testify at the trial.

Moreover, we would not be disposed to excuse a defendant who tenders a three legged chair to a customer who wishes to sit down, on the ground that he did not know the condition of the chair. He would be presumed to know that the chair was unfit for use.

The court could properly find that plaintiff was free from contributory negligence.

The amount awarded is not excessive. The evidence shows that plaintiff sustained some fractured ribs and injury to the "structures of her chest;" that her left side was bruised; she also had an injury to her back; she had difficulty in breathing. The doctor called upon her about twenty-five times.

We see no reason to disturb the judgment and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

only three men. The defendant's statement is that he
 as to who was with him at the time of the murder and that he
 would only be removed. The defendant's knowledge of the
 and's servant of the defendant at the time. The defendant did not
 testify at the trial.

However, we would not be disposed to excuse a defendant
 who testifies a false fact as to a defendant who claims to be
 guilty on the ground that he did not know the defendant at the time.
 He would be presumed to know that the man was guilty for him.
 The court could properly find that defendant was not free

contradictory evidence.

The witness named is not a defendant. The witness knows
 that defendant was with some other person at the time of the
 "struck at the back;" that the fact was omitted; the
 also had an injury to the back; and that defendant is innocent.
 The doctor called upon him about the same time.
 He sees no reason to dispute the statement and is so satisfied.

WITNESSES.

O'Connor, J. J., and Sullivan, J. J., Judges.

37671

CENTRAL REPUBLIC TRUST COMPANY,
as Trustee,

(Complainant) Appellee,

v.

JOE SATIN, et al,

(Defendants)

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COOK COUNTY.

On Appeal of DORA SATIN, MORRIS WEINBERG,
JOE SATIN and JOHN J. FELZMAN, and
Interlocutory Order Appointing a Receiver,

(Defendants) Appellants.

277 I.A. 623

Opinion filed alone Nov. 20, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory decree appointing a receiver for the premises located at 4636-42 Jackson Boulevard, Chicago, improved with a three-story and English basement brick apartment building. A motion to dismiss the appeal was made and reserved to the hearing. This motion is denied. We have not been aided in our consideration of the appeal by briefs on behalf of appellee.

The bill of complaint alleges that on June 5, 1924, Joe Satin and Isadore Matensky executed their trust deed to secure bonds in the amount of \$100,000 secured by the property in question; charges that the Central Trust Company was named as trustee and that certain of the bonds amounting to \$70,000 had not been paid on their maturity; that there was a default in the payment of interest payable June 5, 1933, and taxes for the years 1928, 1929, 1930 and 1931. The trust deed mortgages the income, rents and profits as well as the property. The bill then contains the following allegation as to value:

" * * * that the complainant represents that it has caused the said premises to be appraised by competent real estate operators and appraisers familiar with the value of real estate in the vicinity of the premises described in said bill of complaint, and that in the opinion of the

YOUNG JOHN CLARK, M.D.
1890-1900

५३

1895

(continued)

[illegible]

(Continued)

Opinion filed alone Nov. 30, 1934

— 124 —

10-10-68

Chicago, recovered with a few days' rest.

14 91 7 5 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000 1001 1002 1003 1004 1005 1006 1007 1008 1009 1010 1011 1012 1013 1014 1015 1016 1017 1018 1019 1020 1021 1022 1023 1024 1025 1026 1027 1028 1029 1030 1031 1032 1033 1034 1035 1036 1037 1038 1039 1040 1041 1042

Respectfully,
This letter is yours, and we have not read it.

To find the value of $\log_{10} 1000$ we look at the table and find that $\log_{10} 1000 = 3$.

• 94-1575

The bill of exchange is dated 1st June 1904.

[illegible]

...the report of the ...

100-443887-100

[Faint mirrored bleed-through from reverse side]

உதவி இலாகா

100-443887-100

in a state of confusion, and that in the absence of the
value of these waters in the vicinity of the station has
been set at a considerable and no longer reliable rate has
been asked the said station to be supplied by a constant
supply of water, and that the same should be supplied by a

said real estate operators and appraisers the present market value of the said premises is \$61,000.00, and by virtue thereof the complainant has an insufficient lien for the protection of the indebtedness due it, *** "

There is no allegation as to the value of the property other than that herein set forth. This charge in the bill is not an allegation of value, but is a mere statement that appraisers are of the opinion that that amount represents the value, The bill does not state the value in direct terms. There is no charge in the bill that the property is depreciating nor that there is any waste or misconduct in its management. The only allegation in the bill on which the receiver could possibly have been appointed is that charging the failure to pay taxes. The defendants filed their answer to the bill prior to the appointment of the receiver, denying the material allegations of the bill. It does not appear from the order that any evidence was heard or proof taken by the chancellor on these contested questions. The amended answer filed before the appointment of the receiver alleges that the 1928 taxes were in fact paid in full and part of the taxes for 1929 and 1930 had been paid. A copy of the receipted tax bills for 1928 and the receipts showing part payments for the taxes for the following two years were attached to the amended answer.

The appointment of a receiver, even though the rents and profits of the premises are pledged, is not a matter of right. The chancellor in his discretion may appoint a receiver but it should be based upon facts appearing in the sworn bill or evidence heard in open court.

From the record in this cause there is nothing as to the value of the property upon which the court could predicate the appointment of a receiver, nor does it appear that the property is scant security. Therefore, for the reasons stated in this opinion the interlocutory decree of the Superior Court is reversed.

INTERLOCUTORY DECREE REVERSED.

HEBEL, P.J. AND HALL, J. CONCUR.

said real estate operators and appraisers the present market value of the said premises is \$1,000,000, and by virtue thereof the said premises has an insupportable lien for the protection of the said premises due to it."

There is no allegation as to the value of the property other than that herein set forth. This answer in the bill is not an allegation of value, but is a mere statement that appraisers are of the opinion that that value represents the value. The bill does not state the value in direct terms. There is no charge in the bill that the property is depreciated, nor that there is any waste or mismanagement in its management. The only allegation in the bill on which the receiver could possibly have been appointed is that of failing to pay taxes. The defendants filed their answer to the bill prior to the appointment of the receiver, denying the material allegations of the bill. It does not appear from the order that any evidence was heard or taken by the chancellor on these contested questions. The amended answer filed before the appointment of the receiver alleges that the 1938 taxes were in fact paid in full and part of the taxes for 1939 and 1940 had been paid. A copy of the receipted tax bills for 1938 and the receipts showing past payments for the taxes for the following two years were attached to the amended answer. The appointment of a receiver, even though the rents and profits of the premises are pledged, is not a matter of right. The chancellor in his decision has appointed a receiver but it should be based upon facts appearing in the sworn bill or evidence heard in open court. From the record in this case there is nothing as to the value of the property upon which the court could predicate the appointment of a receiver, nor does it appear that the property is in want of security. Therefore, for the reasons stated in this opinion the interlocutory decree of the circuit court is reversed.

INTERLOCUTORY DECREE REVERSED.

Filed alone November 27, 1934.

37924

METROPOLITAN LIFE INSURANCE
COMPANY, a Corporation,
Appellee,

vs.

SOL RUBIN et al.

MAURICE R. UNION,
Appellant.

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF COOK COUNTY.

277 I.A. 624¹

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal Maurice R. Union seeks to reverse an order appointing a receiver of property in a foreclosure suit.

September 29, 1933, the Metropolitan Life Insurance Company filed its bill to foreclose a mortgage securing an indebtedness of \$125,000, and for other relief. The bill was verified, and alleged default in the payment of taxes for the years 1928, 1929, and 1930, totalling nearly \$14,000, and alleged that there were taxes for 1931, 1932 and 1933, aggregating from \$7,000 to \$8,000 also due and unpaid. There was also default ~~xxxx~~ in the payment of principal and interest, and on the hearing there was evidence to the effect that the property was worth about \$110,000.

The defendants Sol Rubin and his wife owned the property and June 1, 1929, executed the notes and mortgage in foreclosure. The record also discloses that a judgment for \$1,000 was rendered against Sol Rubin January 26, 1927, by the Municipal court of Chicago; that January 30, 1929, this judgment was satisfied as per satisfaction piece that day filed. Afterward the trust deed in the instant case was executed as stated, June 1, 1929. February 1, 1932, the satisfaction piece was stricken from the record in the Municipal court and the judgment reinstated. An execution was issued under this judgment and levied on the real estate conveyed by the mortgage in the case before us, and the property sold by the bailiff in the Municipal court for \$1,320.04. There is also

Filed alone November 27, 1934.

2

RECEIVED FBI WASHINGTON
JUL 20 1964

•

2. The value of β is 0.50, and

1998

© 2005 The Authors
Journal compilation © 2005 Blackwell Publishing Ltd

Journal of Management Education 34(10)p.1111-1124

[illegible]

more than 21 years before the 2001-02 season, all listed. 1991-92

no matter how you decide to spend your time, you'll find it's yours.

© 2006 The Authors
Journal compilation © 2006 Blackwell Publishing Ltd

68-10392-10000

© 2000 Blackwell Science Ltd *Journal of Internal Medicine* 247: 391–397

an allegation to the effect that the property was sold to the judgment creditor and the certificate of sale was assigned in blank at Sol Rubin's request because he did not want to appear as the owner of the certificate, and a deed was later issued to Union.

It further appears that prior to the appointment of the receiver in the instant case, a receiver was appointed for the property in a proceeding brought in the County court by the County Treasurer, and afterward the County Treasurer filed his suit in the Circuit court, where a receiver was appointed.

August 27, 1934, the Circuit court entered an order vacating and setting aside the order appointing the receiver and ordering the receiver to file his report by August 30, 1934, and that the money collected by him be paid to the County Treasurer to be applied on taxes. The order further provided that "Maurice R. Union, owner of said premises, be and he is hereby appointed in lieu of said receiver to collect the rentals and proceeds of said premises and manage the above described premises upon his paying to the County Treasurer the sum of \$150.00 per month for and on account of taxes for the years 1928 to 1933, inclusive, and that the said Maurice R. Union remain in possession of said premises and manage and operate the same and collect the rentals thereof until said taxes are paid in full or until the further order of court."

Afterward, September 27, 1934, the court entered an order in the instant case appointing the receiver, from which order this appeal is taken.

Counsel for the defendant, Union, was in court at the time and objected to the appointment of the receiver on the ground that Union was the owner of the premises. In this court he argues that the Superior court of Cook county did not have jurisdiction to enter the order appointing the receiver because the property was already in the hands of the receiver appointed by the Circuit court of Cook

[illegible][illegible][illegible]

The above mentioned information was received from the Bureau of the FBI, New York City, dated 10-18-67.

county. We think there is no merit in this contention. The order entered by the Circuit court, from which we have above quoted, expressly vacated the order appointing the receiver and attempts to turn the property over to Union who is said to be the owner of the premises. Under that order Union was in no sense a receiver of the property and the Superior court was authorized to appoint the receiver in the instant case.

From what we have said of the facts, it is clear that the defendant, Union, is not in the position of a bona fide owner of the equity of redemption. The allegations of the verified bill indicate that Sol Rubin paid the money for the certificate to the bailiff of the Municipal court and had the deed issued to Union to conceal the fact that Rubin was the real owner of the certificate. The fact that there are allegations in the answer that go to dispute the complainant's right to the appointment of a receiver cannot be considered because the answer was not verified.

The order appointing a receiver is affirmed.

ORDER AFFIRMED.

McSurely and Hatchett, JJ., concur.

37172

ALEX LEVIN,
Defendant in Error,

v.

MORRIS LEWIS,
Plaintiff in Error.

77 A
ERROR TO SUPERIOR COURT,

COOK COUNTY.

277 I.A. 624²

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error, sued out on September 14, 1933, Morris Lewis seeks to reverse a judgment against him for \$15,000, entered after verdict by the superior court on December 18, 1931, in an action for damages for personal injuries received by plaintiff in an automobile accident which occurred on West Roosevelt road (an east and west street) at or near its intersection with Francisco avenue, Chicago, about 1:30 o'clock in the afternoon of August 10, 1928. Plaintiff has not entered an appearance or filed a brief in this court.

The action was commenced on November 7, 1928. Plaintiff's original declaration consisted of three counts, to which defendant filed a plea of the general issue. On November 30, 1931, immediately upon the case being called for trial before a jury, plaintiff obtained leave to file and filed an additional count, and defendant elected to allow his plea of the general issue to the original declaration to stand as a plea to the additional count. In the first count plaintiff averred in substance that on August 10, 1928, defendant was in the possession and control of, and was operating, a certain motor truck westerly upon Roosevelt road at or near its intersection with Francisco avenue, in a closely built up business or residential district

ALAN LAMIN,
Defendant in error,

v.

MORRIS LAWIS,
Plaintiff in error.

STATE OF CALIFORNIA,

COUNTY OF LOS ANGELES.

247 I.A. 624

NO. 1. PETITION FOR WRIT OF HABEAS CORPUS TO REMOVE FROM THE COURT.

By this writ of error, and on September 14, 1933,
MORRIS LAWIS seeks to reverse a judgment against him for \$12,000,
entered after verdict by the superior court on December 18, 1931,
in an action for damages for personal injuries received by plain-
tiff in an automobile accident which occurred on East Roosevelt
road (an east and west street) at or near its intersection with
Francisco avenue, Chicago, about 1:30 o'clock in the afternoon
of August 10, 1933. Plaintiff has not entered an appearance or
filed a plea in this court.

The action was commenced on November 7, 1933. Plain-
tiff's original declaration consisted of three counts, to which
defendant filed a plea of the general issue. On November 30,
1931, immediately upon the case being called for trial before a
jury, plaintiff obtained leave to file and filed an additional
count, and defendant elected to allow his plea of the general
issue to the original declaration to stand as a plea to the
additional count. In the third count plaintiff asserted in sub-
stance that on August 10, 1933, defendant was in the possession
and control of, and was operating, a certain motor truck westwardly
upon Roosevelt road at or near its intersection with Francisco
avenue, in a closely built up business or residential district

of Chicago; that plaintiff, as a pedestrian, was crossing Roosevelt road at or near the intersection, and it was defendant's duty to exercise due care and caution for plaintiff's safety; that not regarding his duty defendant so negligently drove the truck that it ran into plaintiff, then in the exercise of due care for his own safety, and threw him upon the ground and severely and permanently injured him, etc. In the second count the charge is defendant's negligent failure to keep a sufficient lookout so as to have discovered plaintiff as he was crossing the street. The gist of the third count is defendant's negligence in driving the truck at an unreasonable rate of speed, having regard for the traffic and the use of the way, etc., contrary to the statute. The additional count charges willful and wanton negligence. It is averred in substance that at the time and place defendant saw and knew, or in the exercise of due care should have seen and known, that plaintiff was crossing Roosevelt road at or near the intersection in front of the approaching truck, and was in a position of danger unless the speed of the truck was checked or its course changed; and that defendant, disregarding his duty not to injure plaintiff, so "willfully, wantonly and maliciously" drove and operated the truck that it ran against plaintiff, etc.

On the trial plaintiff testified as a witness in his own behalf at considerable length, both on direct and cross-examination. His brother, Michael Levin, who at the time was also attempting to cross the street, testified for him, as did two eyewitnesses to the accident, Morton Pestine (an employee of a garage Co. at Roosevelt road and Paulina street) and Maurie Einbunde (a barber, employed in a shop on the north side of Roosevelt road a short distance west of Francisco avenue). After the accident plaintiff was taken to the Mount Sinai Hospital, and his two other witnesses were Edith

of witness that plaintiff, as a pedestrian, was crossing the road as he went to the intersection, and it was defendant's duty to exercise due care and caution for plaintiff's safety. That in regard to his duty defendant was negligently slow and that it was into plaintiff, then in the exercise of due care for his own safety, and threw him upon the ground and severely and permanently injured him, etc. In the second count the charge is defendant's negligent failure to keep a sufficient lookout so as to have discovered plaintiff as he was crossing the street. The first of the third count is defendant's negligence in driving the truck at an unreasonable rate of speed, having regard for the traffic and the use of the way, etc., contrary to the statute. The additional count charges willful and wanton negligence. It is averred in substance that at the time and place defendant saw and knew, or in the exercise of due care should have seen and known, that plaintiff was crossing the road as he went to the intersection in front of the approach bridge, and was in a position of danger, and that speed of the truck was checked or its power checked; and that defendant, disregarding his duty not to injure plaintiff, so willfully, recklessly and maliciously drove and operated the truck that it ran against plaintiff, etc.

On the third plaintiff testified as a witness in his own behalf as credible facts, and as direct and cross-examination. His brother, Michael Levin, who at the time was also attending to cross the street, testified for him, as did two physicians to the accident, Morton Levin (an employee of a factory at defendant's road and Levin street) and Morris Lerman (a doctor, employee in a shop on the north side of defendant's road a short distance west of Monroe Avenue). After the accident plaintiff was taken to the Mount Sinai Hospital, and his two other children were with

L. Brill (an X-ray technician at the hospital) and Dr. Louis Mandelman, his attending physician for about three years after the accident, who testified as to the treatment given and as to the character, extent and permanency of plaintiff's injuries. Defendant gave his version of the accident and also called one other eyewitness, Raymond Leyburger, who at the time was driving another motor truck easterly on Roosevelt road. At the conclusion of plaintiff's evidence, and again at the conclusion of all the evidence, defendant's motions for a directed verdict in his favor were severally denied. Of the 13 instructions given as offered, 8 were offered by plaintiff and 5 by defendant. Four other instructions, Nos. 16 to 19 inclusive, offered by defendant, were refused. No complaint is here made by defendant as to the court's refusal to give any of these four instructions. Defendant's instruction No. 14 was refused as offered, but the court, on its own motion, modified it by adding certain words thereto and gave it to the jury, so modified, as No. 15. The instruction is as follows, - the modifying words being in italics:

"The Court instructs the jury as a matter of law that before the plaintiff is entitled to recover he must prove by a greater weight of the evidence (1) that the defendant is guilty of negligence; (2) that the plaintiff was free from negligence on his part; and (3) that the plaintiff suffered damage; but if you find from the evidence that the acts of the defendant at the time and place in question were wilful and wanton, then the negligence, if any, of the plaintiff would not be a defense in this case."

One of the given instructions (No. 13) offered by defendant was: "Were the acts of the defendant at the time and place in question wilful and wanton? answer Yes or No." And the court, after giving to the jury the usual forms of verdict, stated to them: "In addition to your general verdict, you will also return an answer 'Yes' or 'No', to the following special interrogatory, to-wit: 'Were the acts of the defendant at the time and place in question wilful and wanton?'" The jury returned a general

verdict finding the defendant guilty and assessing plaintiff's damages at \$15,000. And they also returned a special verdict in which they answered said special interrogatory "Yes."

The main contention of defendant's counsel, here made as a ground for the reversal of the judgment, is that "the finding of the jury on the special interrogatory is against the manifest weight of the evidence." On this issue the evidence was conflicting. A part of plaintiff's testimony is in substance as follows:

On August 10, 1928, I was 25 years of age and lived at 1142 South Francisco avenue, on the west side of the street, a few doors north of Roosevelt Road. My brother, Michael, also then lived there. Francisco avenue ends at Roosevelt road, to the south of which is Douglas Park. Near Francisco avenue and on the north side of Roosevelt there are numerous one-story stores and stores with flats above. I was then employed as a chauffeur by the Yellow Cab Co., but was on a vacation. My brother and I had been away from home and were returning. We had been on an east-bound street car on Roosevelt road and had alighted from the car at Francisco avenue, on the Douglas Park side of Roosevelt road, near the south curb. As it was a clear hot day we were in our shirt sleeves. After the car had started again and had crossed Francisco avenue, we started to cross Roosevelt road. I looked to the west but did not see any traffic coming from that direction. Then I looked to the east and saw that a west-bound street car had stopped or was just stopping on the east side of Francisco avenue, and that people were standing there to board the car. We started north to cross the street. "I never saw the motor truck involved in the accident until it had come from behind that street car and was coming right for me alongside of and south of the street car; I stood still; I didn't know whether to run back to the curb or away from it; my brother started to go back to the curb we had come from and I went with him; I heard my brother cry out and then I had a heavy ache and saw and felt the truck going over my left leg; afterwards I was lying in the street. * * My leg was injured between the knee and ankle. It seemed to me that the right wheel of the truck hit me. It swerved and hit me and then ran onto the south sidewalk." I couldn't move but was conscious and was able to speak. I was assisted up, put into a car and taken to the Mount Sinai Hospital.

Plaintiff's brother, Michael Levin (an attorney-at-law at the time of the trial), testified in part as follows:

After we had gotten off the east-bound ^{street} car, we walked to the south curb of Roosevelt road. When we saw there was no traffic approaching from the west we started to cross the street, going north. Then we saw a west-bound street car coming to a halt, just east of Francisco avenue. "We had taken two or three steps on the west side of Francisco avenue, when I saw a Chevrolet truck dash from behind the street car. It was going at a very

[illegible]

1875.

[illegible][illegible]

rapid rate. It turned to the left of the street car and came at us at an angle, diagonally across the street, * *. I started to go back to the curb. Alex remained momentarily still. I yelled 'look out' and ran to the curb. The next thing I knew I was suddenly struck by the bumper of the truck, and I went over into the bushes, * * landed in the park some distance from the curb. * * I picked myself up and ran back to the curb. I found Alex lying in the street * * and bleeding profusely. The truck stopped partly on the sidewalk. * * It had jumped the curb." Francisco avenue is narrower than Roosevelt road. I don't know how many feet. It is a street of ordinary width.

Plaintiff's witness, Pestine, who claims he saw the accident while he was on the south sidewalk of Roosevelt road west of Francisco avenue, testified in part as follows:

Just before the accident I saw Michael Levin and his brother, Alex, about 15 feet from the south curb of Roosevelt road, and on the west side of Francisco avenue, waiting to cross Roosevelt road. The first time I saw the motor truck involved in the accident was when it had passed to the south of the west-bound street car, which was standing on the east side of Francisco avenue. At that time the Levin brothers were trying to get away from that truck, which was going towards them "at a speed of about 30 miles per hour." * * "This boy (Alex) got run over. The truck knocked both down. Michael was trying to get to the park. * * I heard the squeak of the brakes." I did not hear any horn sounded or any warning given of the truck's approach. "I saw Alex after the accident. He was lying in the street a few feet from the south curb. He was bleeding. * * Some fellows picked him up and took him to the hospital and I went along. * * When we first picked him up he could talk but was not able to walk. * * After the accident the truck was in the park. * * It was a bright day, the sun was shining and the streets were dry."

Plaintiff's witness, Einbunde, testified in part as follows:

I left the barber shop to go to lunch and was walking east on the north sidewalk of Roosevelt road. I had not yet reached Francisco avenue. When I first saw the Levin boys they had started to cross Roosevelt road, going north on the west side of Francisco avenue. I noticed a west-bound street car. When I first saw it it was standing on the east side of Francisco avenue. This was the time the Levin boys started to cross the street. I also saw the motor truck involved in the accident. "The truck tried to cross in front of the street car. I saw it before it came up to the street car and I heard the brakes." * * After that I saw the Levin boys running to the south side of the street. * * Then I saw Alex Levin lying in the street, near the south curb. The truck was on the sidewalk." Afterwards I ran over there and then stopped a car and took Alex to the hospital. I did not actually see the impact, but saw the truck again when it was on the sidewalk.

Defendant's version of the occurrences prior to and at the time of the accident, as testified on direct examination, is in substance as follows:

... as we went on, I saw a man in a dark suit and a woman in a light dress walking away from us. I saw them for a moment, but they disappeared into the crowd. I saw a man in a dark suit and a woman in a light dress walking away from us. I saw them for a moment, but they disappeared into the crowd. I saw a man in a dark suit and a woman in a light dress walking away from us. I saw them for a moment, but they disappeared into the crowd.

Witness's name, address, and date of birth

... of the ...

... I saw a man in a dark suit and a woman in a light dress walking away from us. I saw them for a moment, but they disappeared into the crowd. I saw a man in a dark suit and a woman in a light dress walking away from us. I saw them for a moment, but they disappeared into the crowd. I saw a man in a dark suit and a woman in a light dress walking away from us. I saw them for a moment, but they disappeared into the crowd.

Witness's name, address, and date of birth

...

... I saw a man in a dark suit and a woman in a light dress walking away from us. I saw them for a moment, but they disappeared into the crowd. I saw a man in a dark suit and a woman in a light dress walking away from us. I saw them for a moment, but they disappeared into the crowd. I saw a man in a dark suit and a woman in a light dress walking away from us. I saw them for a moment, but they disappeared into the crowd.

... of the ...

...

I was going west in the truck on Roosevelt road, east of Francisco avenue. I followed the street car, about 20 feet behind it. "After a big truck, going east, had passed me, I seen a fellow in front of me running. I put my foot on the brake so as not to hit him. I was trying to swing out, but I didn't because he passed me. Then I seen the other fellow. I turned the truck right south so as not to hit him. * * This fellow zigzagged. I couldn't turn more south. I hit him with the right bumper, * *. When I hit him I was just about three feet south of the east-bound street car track * *. I was alongside the street car going west." When that street car had stopped east of Francisco avenue to pick up passengers, I stopped my truck behind it and waited for the car to go ahead again, and when it started again I moved forward, going about 18 miles an hour. "I was all the time behind the street car." My truck did not jump the curb. "I was in the middle of the street and afterwards pulled in front of the curb so as not to stop traffic."

On cross-examination defendant testified in substance as follows:

I was in the truck alone when the accident happened. I caught up to the west-bound street car, not far from Francisco avenue. When it stopped there I was about 25 feet behind it "in the rails." I didn't pay any attention as to whether there were people waiting to get on the car. I was waiting to go ahead when the car again started. "When it started I started, and followed right along behind it. * * I went about 20 feet after the car had started, when I first saw the boys. * * I had not gone entirely across Francisco avenue. * * When I first saw them they were about 10 or 15 feet away from me and when the big truck going east had passed me. * * Then I saw the one called Michael who was not hurt. * * After I saw the other one run I swung south so as not to hit him. * * I was not more than 10 feet behind the street car, and about 10 or 15 feet away from the track when the accident happened. Michael passed between my truck and the street car, and then ran back again to the south in front of the truck. * * When I first saw Alex I turned south; he was right in front of my truck, not more than 10 feet away; that was when I turned to the south; I was afraid I would hit him."

Defendant's witness, Leyburger, testified in part as follows:

On August 10, 1928, about 1:30 p.m., I was driving a large truck for William Holtz, going east on Roosevelt road and approaching Francisco avenue. I saw the accident. "I seen a fellow running across the street on an angle and in front of me. I stopped. There was another truck coming west. The first fellow got over clear of that truck, but the other fellow was 'kind of zigzagging.' The right hand bumper of that truck swung around facing south about the middle of the east bound track. That truck hit the second fellow with the right bumper. The first fellow cleared. * * After I had stopped my truck, I saw that other truck coming, but I don't know whether those fellows saw it or not. * * That truck was going, I guess, about 20 miles an hour. The second fellow didn't stop. * * That truck swung south over to my side and hit him with the front right hand side of the bumper. I think there was a west-bound street car then in motion in the intersection. The truck which that fellow was 'not cutting in on

left side of the street car.' * * After the accident happened I gave Lewis my name and address on a piece of paper, and then went ahead. * * I was driving my truck on the east bound car track. * * No one was with me on my truck. When I got to Francisco avenue I saw these boys. When I first saw them they were a little south of the east-bound street car track and I was about 15 or 18 feet away from them. I stopped to let them go in front of me. * * I first noticed the west-bound street car after they had passed in front of me. * * These boys then ran back towards the south curb. * * It looked to me as if they were playing tag in the street, - chasing one another. * * After that truck hit one of the boys in the street it did not go over on the south sidewalk. * * The only traffic I saw there at the time was Lewis' truck, the street car and my truck."

Considering all of the testimony as above outlined, as well as some of the physical facts as disclosed, we are of the opinion that the instant contention of defendant's counsel (that the jury's finding on the special interrogatory is against the manifest weight of the evidence) is without merit. We think that it sufficiently appears that defendant, the driver of the west-bound truck, acted with such an absence of due care for the safety of the persons of plaintiff and of his brother, and with such a conscious indifference to consequences, as warranted the jury in finding in their special verdict that his acts at the time and place were wilful and wanton. In Bremer, Adm'r. v. Lake Erie, etc. R. Co., 318 Ill. 11, 20-21, it is said:

"If there is any evidence in the record fairly tending to show such a gross want of care as indicates a willful disregard of consequences or a willingness to inflict injury, then it is a question to be determined by the jury whether the negligent conduct of the defendant amounted to wantonness or willfulness, * *. What degree of negligence the law considers equivalent to a willful or wanton act is as hard to define as negligence itself, and in the nature of things is so dependent upon the particular circumstances of each case as not to be susceptible of general statement. The gross negligence which will justify the presumption of willfulness or wantonness is such as to imply a disregard of consequences or a willingness to inflict injury."

Defendant's counsel also contend in substance that where the evidence is conflicting it is essential that the jury should be accurately instructed; that they were not accurately instructed in that the court erred in giving instruction No. 4. offered by plaintiff, and in giving the modified instruction No. 15, (above set

forth) and not as it was offered by defendant, and that, hence, the judgment should be reversed. We are of the opinion that the court did not commit reversible error in the particulars mentioned. We think that considering all of the given instructions and the evidence the jury were fully and properly instructed. And there is no substantial merit in counsel's argument as to the claimed improper use of the words "credible and disinterested witnesses" as they appear in instruction No. 4. The jury could not have been misled by the use of the words, when the entire instruction is considered. And we are of the opinion that, in view of all the evidence, the modification of given instruction No. 15, as originally offered by defendant, was proper, and correctly stated the law as regards the contributory negligence, if any, of the plaintiff not being a defense in the case, if the jury found from the evidence that defendant's acts at the time and place in question were wilful and wanton. (See Walldren Express Co. v. Krug, 291 Ill. 472, 476; Heidenreich v. Bremner, 260 id. 439, 452; Lake Shore, etc. R. Co. v. Bodemer, 139 id. 596, 607.)

Defendant's counsel finally contend that the amount of the verdict and judgment is excessive, and the result of passion and prejudice. We cannot agree with the contention. In addition to plaintiff's testimony as to the nature and permanency of his injuries, and as to his pain and suffering during a long period of time, the uncontradicted testimony of his attending physician, Dr. Handelman, is in part as follows:

I first saw him in the emergency room of the Mount Sinai Hospital on August 10, 1928. We put him to sleep in the operating room and I examined his left leg. "I found a crushing injury of the lower third of the leg; both tibia and fibula were broken; the tibia had a fracture of about 3 inches in length, loosened from the rest of the bone; it was all lacerated and torn and full of dirt; and the fibula was fractured but in a simple way. * * I cleansed the injury and decided that the only way to get the two broken ends of the bones together would be by a metal plate. * * After the plate had been put in we put the leg in a cast from the toes to above the

knee, and cut a window over the area of the operation to permit dressing." He remained in the hospital until August 31st, when he was permitted to go home. During this time the leg was dressed almost daily. Afterwards he came to the hospital clinic once or twice a week for dressing, during which time an infection developed, and on October 18th he was readmitted to the hospital and, under an anaesthetic, the metal plate was removed. At the time of this second operation no callus had formed, and we put the leg back into the cast and treated him with ultra violet rays and electricity. The purpose of this treatment was to stimulate callus formation, which "continued for almost a year." On July 24, 1929, he was again admitted to the hospital. "At that time we decided to use a bone graft, which means taking a piece of healthy bone from another location and grafting it in between two broken ends and fixing it into place." On July 24, 1929, this was done and we again put the leg into a cast to allow the new bone to produce callus. "The new bone was taken from the upper end of the shin bone of the same leg." I was assisted in this operation by another doctor and the house interne. "I kept him in the hospital for two months until September 23, 1929, when he was again discharged. His leg was still in a cast. We had again put in a bay window to permit dressing, which a slight infection required. We told him to come to the hospital for dressings, and he continued to come back for treatments for almost a year." I have examined and have continued to treat his leg about once a month since the fall of 1930 (about a year). After the accident he had considerable pain following the first operation, and to alleviate it we gave him morphine. (Two X-ray pictures, which had been introduced in evidence shown witness.) "This picture (one of the X-ray pictures) shows the tibia or shin bone. * * The right hand view shows that the fibula is not in good position. There is no alignment or continuity. The tibia position is not bad, but it shows a very marked fracture of the bone - it sticks to the healthy part above. * * There is still no complete union between the two fractures." And the witness further stated that in his opinion, from a medical and surgical standpoint, the said condition of plaintiff's leg is permanent.

Our conclusion is that the judgment against defendant for \$15,000, rendered on December 18, 1931, should be affirmed, and accordingly such will be the order.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

37222

EDWARD G. KESLER,
Defendant in Error,

v.

FRANK E. DINGLE,
Plaintiff in Error.

78 7
ERROR TO CIRCUIT COURT
OF COOK COUNTY.

277 I.A. 624³

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

A prior unpublished opinion in this cause was here filed on October 4, 1932. The action, commenced on August 13, 1931, was in assumpsit for money had and received for plaintiff's use, in the amount of \$6,000. On January 9, 1932, on plaintiff's motion, the circuit court struck defendant's amended affidavit of merits (accompanying his plea of the general issue with notice of special matters of defense to be relied upon) and entered judgment against him as in default for \$6,000, from which judgment he here perfected an appeal. We reversed that judgment and remanded the cause (267 Ill. App. 619), stating in the opinion in substance that in his amended affidavit he had set up the special matters of defense with "unnecessary prolixity," and while certain of these matters might not constitute good defenses, still there were other special matters which disclosed prima facie good defenses, and that the demanded jury trial on the issues should have been had. In all of these prior proceedings defendant, being an attorney-at-law, acted pro se. After the cause was recketed in the circuit court defendant retained to assist him in the impending trial additional counsel, who filed their appearance as such, and on December 31, 1932, defendant, pro se, obtained leave to file and filed a "second amended affidavit of merits and claim in recoupment."

The instrument is a lengthy one. On January 9, 1933, a jury trial was commenced, during which much oral testimony was introduced by the respective parties, and certain letters and other writings were introduced by defendant. At the close of plaintiff's evidence and again at the close of all the evidence defendant's motions for a directed verdict in his favor were respectively denied. On January 11th the jury returned a verdict finding the issues for plaintiff and assessing his damages at the sum of \$6,000, and on March 18, 1933, judgment in that sum was entered against defendant, which judgment by the present writ of error he seeks to reverse.

Plaintiff's declaration consisted of the common counts, to which was attached the usual affidavit of claim, alleging that there was due to him from defendant the sum of \$6,000, together with legal interest from February 15, 1931. After defendant had filed a plea of the general issue and his original affidavit of merits, he obtained a rule on plaintiff to file a bill of particulars, and on October 19, 1931, such bill of particulars was filed. In it plaintiff made the following statements in substance:

On April 1, 1926, the Kankakee Building Corporation, (hereinafter called the Kankakee Corp.) executed a trust deed (recorded in the office of the recorder of deeds at Kankakee, Illinois) conveying certain real estate to the City State Bank of Chicago, as trustee, (hereinafter called the Bank) to secure a certain issue of its bonds of the aggregate par value of \$425,000, which bonds were thereafter sold to the public. Thereafter it made default in the payment of accrued interest on the bonds, and on October 21, 1927, a Bondholders' Protective Committee was formed and a large number of the bondholders deposited their bonds with the depository named in the Bondholders' Deposit Agreement, by which said committee had been created. Plaintiff is an attorney-at-law, and during the year 1928 officers of the Bank and members of the committee consulted him as to the advisability of bringing an action to foreclose the trust deed. Prior thereto, on December 1, 1926, the Kankakee Corp., as principal, and the Royal Indemnity Co., as surety (hereinafter called the Indemnity Co.), had executed and delivered an indemnity bond, running to the Bank as trustee, for the benefit of the bondholders, whereby they bound themselves in the sum of \$125,000 to erect and complete the building on the real estate before July 1, 1927, and, the building not having been completed, officers of the Bank and members of the bondholders'

committee also consulted plaintiff as to the advisability of instituting an action at law on said bond. After numerous conferences plaintiff was retained by the Bank, with the consent of the members of the committee, to bring both actions, and thereafter plaintiff was given permission to employ defendant as an associate attorney to assist him in both, and defendant was so employed. Thereafter defendant, with plaintiff's aid, drafted a bill to foreclose the trust deed, and submitted the draft to plaintiff, who approved it, and the bill was filed in the circuit court of Kankakee county, in the name of the trustee Bank as complainant, against the Kankakee Corp., et al., as defendants, - the present plaintiff and the present defendant appearing in the suit as the solicitors for the Bank. Thereafter plaintiff, as one of the solicitors, did considerable work in causing a certain mechanic's lien suit, then pending in Kankakee county and involving the same real estate, to be consolidated with the foreclosure suit. Thereafter plaintiff and defendant each did work as joint solicitors in putting the cause at issue, making investigations and searches, interviewing witnesses, examining authorities, and preparing for the hearings before the master, which thereafter were had, - the same being completed in the fall of the year 1929. On these hearings, by agreement, defendant examined the witnesses, but plaintiff was present at all hearings and performed other required work in connection therewith. On June 6, 1928, plaintiff and defendant, acting jointly as attorneys for the Bank, caused suit to be commenced in the circuit court of Cook county on the bond against the Indemnity Co., and thereafter each did work in the prosecution thereof, when, after numerous conferences with officers of the Bank, it was decided to postpone further prosecution of the suit until a decree had been entered in the foreclosure suit.

On November 2, 1929, the Bank was closed by the Illinois Auditor of Public Accounts and a receiver of its assets was appointed, since which time its affairs have been in process of liquidation. During the year 1930 plaintiff on numerous occasions called at defendant's office and inquired as to the status and the progress made in the foreclosure suit, and finally was informed that a favorable master's report had been exhibited, but that objections had been filed thereto and were pending. Thereupon plaintiff inquired what assistance he might render in preparation for the argument upon the objections, and in the drafting of the decree in case the objections were overruled. Defendant replied that he would require no assistance from plaintiff in preparation for that argument or in the making of it, and that he preferred for stated reasons to do that work himself. Subsequently defendant informed plaintiff that said argument had been had and that the master had overruled all objections to his report and that he (defendant) was at work in preparing the draft of a decree of foreclosure. Plaintiff again suggested that he render assistance in the work, but defendant said that he did not need it, and that if he found that he did he would advise plaintiff. Subsequently defendant, having drafted the decree, without any notice to plaintiff, caused it to be entered by the Kankakee County circuit court. One of its provisions was that there should be allowed, as complainant's solicitors' fees the sum of \$5,000. Subsequently, without notice to plaintiff, defendant had various conferences with said bondholders' committee, with the Receiver for the Bank and his counsel, and with others, which resulted in the drafting of various agreements, in the resignation of the Bank as trustee, in the appointment of another bank in its stead, and in the agreement

by said other bank to pay said sum of \$5,000, so allowed as solicitors' fees in said decree, which sum was thereafter paid to defendant. In the carrying on of these negotiations "defendant, deliberately and for the purpose of defrauding plaintiff of his just rights and his interest in said fees, provided in said agreements that said fees be paid to him individually, instead of to him and plaintiff jointly, and further provided for the payment of additional fees to him individually;" that in preparing the papers he "made no mention of the fact that he was endeavoring to collect all fees personally, and he deliberately concealed from the other interested parties that he was undertaking to supplant plaintiff, but by his conduct led all of said parties to believe that plaintiff was still interested in the litigation and entitled to share in said fees."

Thereafter defendant, without notice to plaintiff, although he was at all times one of the attorneys of record in the pending lawsuit on the indemnity bond against the Indemnity Co., called meetings and attended conferences of the parties interested therein and of the members of the bondholders' committee, with the result that the suit was settled for the sum of \$75,000, paid by the Indemnity Co. After the making of this settlement the attorneys' fees were fixed at the sum of \$7,000, and in the agreements at that time drafted by defendant, without notice to plaintiff, it was provided that defendant should be paid \$7,000 for attorneys' fees and he was so paid. When said agreements were prepared and executed all of the parties interested knew that the appearances of both plaintiff and defendant had been entered as attorneys for the Bank and believed that they were dealing with one of its two attorneys, and they did not then know that defendant was endeavoring to get and retain all of said fees, without accounting to plaintiff for his share. The total sum so received by defendant, as and for attorneys' fees in both litigations, is \$12,000, and of this sum in equity and good conscience plaintiff is entitled to one-half, or \$6,000.

In defendant's lengthy second amended affidavit of merits, filed on the eve of the trial, the various claimed defenses amount in substance to the following: (1) That no partnership relation ever existed between plaintiff and defendant; (2) that even if there was a joint employment of both of them as attorneys to represent the Bank in both litigations, such joint employment ceased upon the appointment in November, 1929, of a receiver of the Bank; and (3) that plaintiff cannot recover any part of the fees paid to defendant because of his representing conflicting interests. On the trial plaintiff was his principal witness and he testified at great length, both on direct and cross-examination. Three other witnesses testified in his behalf. Defendant also testified at great length in his own behalf, and he called three

other witnesses. Plaintiff also gave certain testimony in rebuttal. The entire testimony in certain particulars was somewhat conflicting, but no useful purpose will be served in a lengthy discussion of it. Suffice it to say that in our opinion there is abundant evidence in the record to sustain plaintiff's claim to one-half of the sum of \$12,000, admittedly received by defendant for attorneys' and solicitors' fees, as outlined in plaintiff's bill of particulars. And it was for the jury to say, under all the evidence, whether or not one-half of said \$12,000 (or \$6,000) in equity and good conscience belonged to plaintiff and should be paid to him, and we are not disposed to disturb their verdict, or to reverse the judgment in question, on account of any of the contentions urged by defendant, which we deem to be without substantial merit.

The judgment in question should be affirmed and it is so ordered.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

other witnesses. Plaintiff also gave certain statements in
deposition. The entire deposition is certain statements was
examined and verified. But no other persons will be sworn in a
deposition of 14. Plaintiff is not a party to the deposition
there is a certain evidence in the record as certain statements
plain to one-half of the sum of \$12,000, plaintiff received by
deposits for attorney's and witnesses' fees, as defined in
Plaintiff's bill of particulars. And it was for the jury to say
under all the evidence, whether or not one-half of said \$12,000
(or \$6,000) in equity and good conscience belongs to Plaintiff
and should be paid to him, and no other person or persons
their verdict, or to reverse the judgment in question, on account
of any of the considerations by Plaintiff, which we have in

37285

LEANDER LACHANCE,
Defendant in Error,

v.

CHARLES DICKINSON,
Plaintiff in Error.

79 H
ERROR TO MUNICIPAL
COURT OF CHICAGO.

277 I.A. 624⁴

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, Charles Dickinson, seeks to reverse a judgment for \$17,674.47, rendered against him on December 11, 1933, "on the default and assessment of damages herein." The recitals contained in the judgment order are as follows:

"It appearing to the court that plaintiff has filed as provided by law an affidavit showing the nature of his demand and the amount claimed to be due ^{him} from defendant, * * and that this cause is a suit for the recovery of money, and that defendant is in default for want of an affidavit of merits of defense in this cause, it is, on plaintiff's motion, ordered that default be entered herein against defendant for want of such affidavit of merits. And, as to the damages sustained by plaintiff, the Court hears the evidence contained in the affidavit of plaintiff's claim filed herein, and finds therefrom that there is due to plaintiff the sum of money shown in said affidavit of claim to be due, and assesses plaintiff's damages in the sum of \$17,674.47."

On February 27, 1934, after the clerk's transcript of the record had here been filed, plaintiff's motion to dismiss this cause, on the ground that defendant had not filed his abstract and brief within apt time, was denied. On the following day, by leave of this court, a stipulation signed by the attorneys for the respective parties, together with a so-called additional record duly certified by the clerk of the municipal court under date of February 16, 1934, was filed. It was agreed that "the attached certified copy of a portion of the record of proceedings in the

Plaintiff's motion for judgment in error.

Plaintiff's motion for judgment in error.

Plaintiff's motion for judgment in error.

Plaintiff's motion for judgment in error.

Plaintiff's motion for judgment in error.

Plaintiff's motion for judgment in error.

By this act of error judgment, Plaintiff's motion,

seems to require a judgment for \$15,000.00, rendered against him

on February 12, 1933, on the basis of and assessment of damages

herein. The recitals contained in the judgment order are as

follows:

"It appearing to the court that Plaintiff has filed
as provided by law an affidavit showing the nature of his demand
and the amount claimed to be due him, and that
this cause is a suit for the recovery of money, and that defendant
is in default for want of an affidavit of defense in
this cause, it is, on Plaintiff's motion, ordered that default be
entered herein against him, for want of such affidavit of
defense, and so the damages claimed by Plaintiff, the Court
hereby awards to Plaintiff in the sum of \$15,000.00, and
finds that there is due to Plaintiff
the sum of money shown in his affidavit of claim to be due, and
assesses Plaintiff's damages in the sum of \$15,000.00."

On February 27, 1933, after the clerk's transcript of

the record had been filed, Plaintiff's motion to dismiss this

cause, on the ground that defendant had not filed his affidavit and

entry within the time, was denied. On the following day, by leave

of this court, a stipulation signed by the attorneys for the

respective parties, together with a so-called additional record

was certified by the clerk of the municipal court under date of

February 16, 1933, and filed. It was agreed that the record

certified copy of a portion of the record of proceedings in the

municipal court be incorporated in the transcript of record," and that the stipulation "is not to be construed in any manner as constituting a general appearance of defendant (plaintiff in error), - said defendant hereby preserving all rights which he may have by virtue of his special appearance in the municipal court." The records disclose the following:

On May 24, 1933, plaintiff commenced an assumpsit action of the first class against defendant on a promissory note. By the note, dated June 24, 1926, a copy of which is attached to and made a part of plaintiff's statement of claim, defendant promised to pay, five years after date, to the order of himself the principal sum of \$15,000, with interest at 6-1/2% per annum until maturity (and 7% after maturity), payable semi-annually, as evidenced by ten interest coupon notes. On the face of the note it is stated that it is secured by a trust deed of even date on real estate in Cook county. The note is indorsed by defendant and there are other indorsements showing the payment of all accrued interest up to December 24, 1930, aggregating \$3,412.50. In plaintiff's statement of claim he alleged that he is the owner and holder of the note; that the principal is wholly unpaid; and that the amount of interest due on May 24, 1933, is \$2,012.50. In the accompanying affidavit of claim it is stated that there is due from defendant, after allowing all just credits, deductions and set-offs, the total sum of \$17,012.50.

After the original summons and other summonses had severally been returned "not found," the bailiff succeeded in obtaining service upon defendant upon a summons issued on November 7, 1933, which directed him to appear before said court on Monday, November 20, 1933, to answer unto plaintiff. The return on the back of the summons is signed in the name of the bailiff by "John

plaintiff would be interested in the ownership of the same, and that the stipulation "is not to be construed in any manner as constituting a general agreement of indemnity (plaintiff in error), and defendant hereby reserves all rights which he may have by virtue of his special knowledge in the plaintiff's court." The

records disclose the following:

On May 24, 1933, plaintiff commenced an equitable action of the first class against defendant on a promissory note. By the note, dated June 21, 1930, a copy of which is attached to and made a part of plaintiff's statement of claim, defendant promised to pay, five years after date, to the order of plaintiff, the principal sum of \$10,000, with interest at 4-1/2% per annum until maturity (and 7% after maturity), payable semi-annually, as evidenced by ten interest coupon notes. On the face of the note it is stated that it is secured by a first trust of even date and real estate in Cook County. The note is indorsed by defendant and there are other endorsements showing the payment of all interest interest due to defendant. On November 24, 1933, defendant, in plaintiff's action, made of claim he alleged that he is the owner and holder of the note; that the plaintiff is guilty of fraud and that the amount of interest due on May 24, 1933, is \$2,112.50. In the accompanying affidavit of claim it is alleged that there is due from defendant, after allowing all that credits, deductions and set-offs, the total sum of \$17,012.50.

After the original answer and other pleadings had been served, defendant returned "not found". The plaintiff introduced in evidence certain evidence upon which he based his claim of November 7, 1933, which directed him to appear before said court on January 1, 1934, to answer under oath. The return on the basis of the summons is signed in the name of the plaintiff by John

W. Touhy, Deputy," and is as follows:

"Served this writ on the within named defendant, Charles Dickinson, by delivering a copy thereof to him, and at the same time informing him of the contents thereof, in the City of Chicago, this 13th day of Nov. 1933."

Five days thereafter (November 18th) defendant filed his special appearance, pro se, accompanied with a "written motion to quash service," in which he states that the purported return of service of process upon him should be quashed "for that no copy of the statement of claim was ever served upon him as required by law, and no actual service of process was ever had upon him." Also accompanying the motion is the affidavit, sworn to on November 18, 1933, of one Wesley Ellis, in which he states that "at the request of the counsel for defendant" he went to the clerk's office of the municipal court and examined the files of the cause; that both the original and copy of plaintiff's statement of claim were in the file, - also an alias summons, "bearing the file mark of the clerk Nov. 15, 1933;" that the summons "purported to be returned as served" upon Charles Dickinson on "Nov. 13, 1933" by John W. Touhy, deputy bailiff; but that it "had no copy or copies or other document attached, and is intact with no pin holes or punch marks, or others, as now remaining on file." These instruments, on the cover or back, are marked by the clerk of the court as having been filed during the morning of November 18, 1933. And on the cover, in addition to the number and title of the cause, are the words, printed in typewriting, "Fred W. Story, 427 Reaper Block, City. Of Counsel to Charles Dickinson, pro se."

On November 28, 1933, plaintiff's attorney caused written notices to be served respectively on defendant and said Story, to the effect that on the following day, at 9:30 o'clock, A. M., or as soon thereafter as he could be heard, he would appear before one of the judges of the municipal court (Judge Green) in his court

W. Tenny, Deputy, and is as follows:

"I have this writ on the within named defendant, Charles G. Green, by delivering a copy thereof to him, and at the same time informing him of the contents thereof, in the City of Chicago, this 11th day of May, 1933."

Five days thereafter (November 11th) defendant filed

his appeal appearance, and so, accompanying with a "written motion to quash service," in which he stated that the purported return of service of process upon him should be quashed "for that no copy of the statement of claim was ever served upon him as required by law, and no actual service of process was ever had upon him."

Accordingly the motion is the basis, upon which on November 13, 1933, of one entry filed, in which he stated that "at the request of the undersigned" he went to the clerk's office of the municipal court and examined the files of the court; that both the original and copy of plaintiff's statement of claim were in the

file, - also an alias summons, bearing the file mark of the clerk Nov. 13, 1933; that the summons purported to be returned as served, upon Charles G. Green on Nov. 11, 1933, by John A. Tenny, Deputy Sheriff; but that it "was no copy or copy of other document attached, and is intact with no pin holes or punch marks, or others,

as not remaining on file." These instruments, on the cover or back, are marked by the clerk of the court as having been filed during the morning of November 13, 1933. And on the cover, in addition to the number and date of the court, are the words, printed in typewriting, "W. Tenny, City Recorder, Clerk, Ill."

Of Counsel to Charles G. Green, pro se.

On November 16, 1933, plaintiff's attorney caused return notices to be served respectively on defendant and said copy, to the effect that on the following day, at 9:30 o'clock, A. M., or as soon thereafter as he could be heard, he would appear before one of the judges of the municipal court (Judge Green) in his court

room in the City Hall and ask that "the special appearance of defendant be stricken and that his motion to quash be overruled." It appears from the notice as afterward filed that accompanying it is the affidavit of one Burfeind that he served the notice upon defendant by leaving a copy of the notice at the Blackstone Hotel, Chicago, which is defendant's residence, and that he also served said Story by leaving a copy of the notice at his office, Room 427, 105 N. Clark street, Chicago, all before 4 o'clock, p.m., on November 28th.

On the following day (November 29th) the court entered an order that "plaintiff comes and moves the court to strike said special appearance and affidavit;" that the court, being fully advised, "sustains said motion;" that "leave be given defendant that the special appearance stand as a general appearance;" and that "on motion of defendant * * the time to file an affidavit of merits in the cause be and the same is hereby extended ten (10) days from today." (i.e., until December 9, 1933.) No bill of exceptions is contained in the record as to what occurred in court on that day. Thereafter on December 11, 1933, and after the lapse of more than ten days, the judgment order now in question was entered as first above mentioned. And on January 10, 1934 (within 30 days after said judgment order had been entered), the same judge who had entered the order of November 29, 1933, as well as the judgment order in question, entered the following nunc pro tunc order:

"It is ordered that the order of November 29, 1933, be amended nunc pro tunc so as to read:

Now comes the plaintiff in this cause and moves the court to strike special appearance and affidavit, and the court being fully advised in the premises sustains said motion.

It is ordered by the court that a rule be and the same is hereby entered on defendant to let special appearance stand as general appearance, and that a rule be and the same is hereby entered on defendant to file an affidavit of merits in ten (10) days."

No bill of exceptions is contained in the present record

now in the City Hall and that the special appearance of
defendant be excluded and that his motion be made as provided.

It appears from the notice of appearance that defendant
is in the at least of one instance that he served the notice upon
defendant by leaving a copy of the notice at the Wisconsin Hotel,

Chicago, which is defendant's residence, and that he also served
said copy by leaving a copy at the office of his attorney, Room 427,
105 N. Clark Street, Chicago, Ill. dated 4 o'clock, p.m., on

November 28th.

On the following day (November 29th) the court entered
an order that "plaintiff come and move the court to strike said

special appearance and affidavit; and the court, being fully
advised, "sustains said motion;" that "leave be given defendant that

the special appearance stand as a general appearance;" and that
"on motion of defendant * * the time to file an affidavit of service

in the cause be and the same is hereby extended ten (10) days from
today." (i.e., until December 9, 1933.) No bill of exceptions is
contained in the record as to what occurred in court on that day.

Thereafter on December 11, 1933, and after the lapse of more than
ten days, the judgment order now in question was entered as filed
above mentioned. And on January 15, 1934 (within 30 days after

said judgment order had been entered), the same judge, who had
entered the order of November 29, 1933, as well as the judgment
order in question, entered the following amended order:

"It is ordered that the order of November 29, 1933,
be amended and now being to be read
to read the plaintiff in this cause and move the
court to strike special appearance and affidavit, and the court
being fully advised in the premises sustains said motion.
It is ordered by the court that a rule be and the
same is hereby entered on defendant to file special appearance
stand as general appearance, and that a rule be and the same is
hereby entered on defendant to file an affidavit of service in
ten (10) days."

No bill of exceptions is contained in the present record.

showing what occurred in court on that day, or on whose motion the second clause of said order was made.

One of defendant's assignments of error, as a ground for the reversal of the judgment in question, is that the trial court was without jurisdiction to enter the judgment because of "want of service of process on defendant." We find no merit in the contention. The return of the bailiff on the last of the alias summonses (issued on November 7, 1933) shows that personal service thereof was had on defendant on November 13th. It is well settled in this State that the return on a summons in due form by the proper officer in due course of his official duty, showing the service on a defendant, will not be set aside on his uncorroborated testimony. (Moore v. Robbins, etc. Co., 252 Ill. App. 24, 30-31; Marnik v. Cusack, 317 Ill. 362, 364.) And there are certain significant facts disclosed in the record, viz., that the suit was commenced in May, 1933; that plaintiff by the issuance from time to time of numerous summonses made unsuccessful efforts to have defendant served with process; that within five days after he was served on November 13th (according to the bailiff's return) defendant entered a special appearance, accompanied with a written motion to "quash service," and for the reason as stated therein that "no copy of the statement of claim was ever served upon him." This is a first class case in the municipal court, and we are not aware of any statute or any rule of the court, pertaining to cases of that class, that required the giving to a defendant of a copy of a plaintiff's statement of claim at the time service of process upon him is had. It is true that in defendant's motion to quash there is the statement that "no actual service of process was ever had upon him," but the statement is not verified, and it does not appear in the present record, by evidence or otherwise, that defendant was not duly served

showing that occurred in court on that day, or at whose motion the second phase of said trial was held.

One of defendant's assignments of error, as a ground for the reversal of the judgment is that the trial court was without jurisdiction to enter the judgment because of "want of service of process on defendant." It is not in the contention. The return of the writ on the last of the first summons (issued on November 7, 1933) shows that personal service thereof was had on defendant on November 13th. It is well settled in this State that the return on a writ in the form by the proper officer in the return of his official duty, showing the service on a defendant, will not be set aside on his uncontroverted testimony. (Mohr v. Mohr, 211 Ill. App. 2d, 2-31; Wright v. Wright, 211 Ill. App. 2d, 2-4.) And there are certain significant facts disclosed in the record, viz., that this was commenced in May, 1933; that plaintiff by the return filed time to time of numerous summonses were returned to him to have defendant served with process; that plaintiff filed a writ after he was served on November 13th (according to the writ's return) defendant entered a special appearance, accompanied with a written motion to "quash service," and for the reason as stated therein that "no copy of the statement of claim was ever served upon him." This is a first class case in the municipal court, and we are not aware of any statute or any rule of the court, containing no cause of that class, that required the giving to a defendant of a copy of a plaintiff's statement of claim at the time service of process upon him is had. It is true that in defendant's motion to quash there is the statement that "no actual service of process was ever had upon him," but the statement is not verified, and it does not appear in the present record, by evidence or otherwise, that defendant was not only served

with process on November 13th, as stated in the bailiff's return.

Another contention is that the court erred "in striking defendant's special appearance and affidavit without notice." But the record sufficiently discloses that such action was taken by the court on plaintiff's motion and after due notice of the motion had been given to defendant and to his counsel, Story.

Another contention is that the court erred "in entering the judgment without the returns of process in the months of September and October." The record discloses that several successive alias summonses were issued, prior to the one in question which was issued on November 7, 1933; that a prior summons was issued on October 19th, also other prior summonses during the months of June and July, all of which were returned by the bailiff "not found;" but that no summonses were issued during the months of August and September. And counsel argues that because of this the suit was improperly allowed to "languish." The contention and argument are without merit. We are not aware of any statute or rule of practice, after several issued summonses have been returned "not found," that requires the continued issuance of summonses every calendar month until service is had.

Counsel also contends that, as to the returned summons issued on November 7, 1933, showing service upon defendant, it does not bear any file mark of the clerk as having been filed in his office. A sufficient answer to the contention, if one is needed, is that in the affidavit of Wesley Ellis of November 18th (supporting defendant's motion to quash) it appears that when he examined the file of the case in the clerk's office, said returned summons was in that file "bearing the file mark of the clerk Nov. 15, 1933."

Our conclusion is that there is no error appearing in the record warranting a reversal of the default judgment in question, entered against defendant on December 11, 1933, and, accordingly, it is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

with reviews on November 17th, as stated in the Bulletin's column.

Another contention is that the court was "in violation of defendant's special agreement not to divulge financial facts." The record affirmatively discloses that such action was taken by the court on plaintiff's motion and after due notice of the motion had been given to defendant and to the court, thereby.

Another contention is that the court was "in violation of the judgment without the return of process in the month of September and October." The record discloses that several summonses were issued, prior to the end of the month of September and October 1931, and a return was made which was issued on November 7, 1931; that a return was made on October 19th, also other prior returns during the months of June and July, all of which were returned by the plaintiff "not found;" but that no summons were issued during the months of August and September. The court's return of this the will was properly filed in "January." The contention and return were without merit. We are not aware of any return of will or process, other than I stated, because have been returned "not found," that return of the continued absence of summons every calendar month until service is made.

Defendant also contends that, as to the return of summons issued on November 7, 1931, and the return upon defendant, it does not state any return of the return of summons filed in his office. I submitted answer to the court, it was in return, it was in the affidavit of July 11th of November 1931 (reporting defendant's motion to quash it) appears that when he returned the file of the case in the clerk's office, said summons were not in that file because the return of the clerk was, in 1931, the return is that there is no return of summons in the record containing a statement of defendant's judgment in question, entered against defendant on November 11, 1931, and, accordingly, it is affirmed.

37304

AARON J. GOLLMAN and
J. R. ROSEFIELD,
Defendants in Error,

v.

A. M. FRIEDE and
S. KIRSCHENBAUM,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

277 I.A. 625¹

MR. PRESIDING JUSTICE GRIMLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendants seek to reverse a judgment for \$1,992.50, rendered in a first class case after verdict against them on January 16, 1932, as indorsers of the following promissory note, which had on its face immediately above the signatures of the two makers a confession of judgment clause:

"\$1750.

July 23, 1929.

Ninety (90) days after date, for value received, we promise to pay to the order of A. M. Friede Seventeen hundred fifty and no/100 Dollars, at 3235 Franklin Blvd., Chicago, Ill., with interest at six per cent per annum after date until paid.

(Signed)

E. C. KROON
HARRY M. KROON."

According to its terms the note matured on October 21, 1929.

The suit was commenced on December 6, 1929, and defendants demanded a jury trial. In plaintiffs' amended statement of claim, filed December 21, 1929, after stating that their claim is upon said note, they alleged that it "was delivered unto them by endorsement thereof by said defendants, Friede and Kirschenbaum, for value and before maturity;" that there is now due and owing on the note the total sum of \$1,785, including accrued interest of \$35; that payment of said sum has been demanded of defendants "by demand in writing duly made when payment was refused by the makers;" and that defendants, although having promised

AMERICAN & FOREIGN TRADING CO.
100 N. W. 10th St.
Chicago, Ill.

AMERICAN & FOREIGN TRADING CO.
100 N. W. 10th St.
Chicago, Ill.

27304

AMERICAN & FOREIGN TRADING CO.
100 N. W. 10th St.
Chicago, Ill.

AMERICAN & FOREIGN TRADING CO.
100 N. W. 10th St.
Chicago, Ill.

By this writ of error defendant seeks to reverse a
judgment for \$1,932.50, rendered in a first class case after ver-
dict against them on January 22, 1929, as interveners of the following
promissory note, which had on its face immediately above the sig-
nature of the two makers a recitation of judgment entered:

"Given.
Alvany (90) days after date, for value received, we
promise to pay to the order of J. J. Alvany, seven hundred fifty
and no/100 dollars, at 3255 Franklin Blvd., Chicago, Ill., with
interest at six per cent per annum after date until paid.
(Signed)
J. J. ALVANY
MARRY E. ALVANY."

According to its terms the note matured on October 21, 1929.
The suit was commenced on December 8, 1929, and defendant demanded a
jury trial. In plaintiff's amended statement of claim filed December
21, 1929, after stating that their claim is upon said note, they claimed
that it was delivered unto them by endorsement placed by said defen-
dant, Alvany and Alvany, for value and before maturity, 1929.
There is no one and owing on the note the total sum of \$1,932.50.
Alvany secured interest of 6%; that payment of said sum has been
demanded by defendant "by taking in writing all moneys then payment was
refused by the makers," and that defendant, although having promised

to pay said sum upon the due date and upon demand, have refused and still refuse so to do. Accompanying the statement is the usual affidavit of the amount due. It will be noticed that the theory of plaintiffs' right to recover from defendants as indorsers of the note is in substance that, after demand for payment had been made of the makers at the maturity of the note and such payment by them had been refused, due notice of the dishonor of the paper had been given to the indorsers. To the statement of claim each defendant filed an affidavit of merits.

In Friede's affidavit, while admitting that he was one of the indorsers of the note, he in substance denied that when payment thereof had been refused by the makers, notice of that fact had in due time been given to him in writing or otherwise. In Kirschenbaum's affidavit the defense is similar. While also admitting that he was one of the indorsers of the note, he in substance denied that he had in proper time received any notice of the maker's non-payment of the note, and alleged that "the first notice or knowledge he had that the note was not paid was not until November 15, 1929."

On the trial plaintiffs called each of the defendants as a witness under section 33 of the Municipal Court Act and each gave testimony. Goldman also testified in plaintiff's behalf at considerable length both on direct and cross examination. Friede and Kirschenbaum each again testified and defendants also introduced a certain notice or letter, dated Chicago, November 15, 1929, addressed to Kirschenbaum in Chicago and signed by the "Star Loan & Mortgage Co." under which name plaintiffs were engaged in business in Chicago. The principal issue of fact upon the trial was whether or not plaintiffs had given due notice to defendants, as indorsers, of the non-payment or dishonor of the note by its makers, the Kroons. On this issue the evidence was somewhat conflicting. As we have reached the

to pay said sum upon the due date and upon demand, have refused and still refuse so to do. Defendant in statement in the last affidavit of the amount due. It will be noticed that the theory of plaintiff's right to recover from defendant as indorser of the note is in substance that, after demand for payment had been made of the makers at the maturity of the note and such payment by them had been refused, and notice of the dishonor of the paper had been given to the indorser, to the statement of which own defendant filed an affidavit of denial.

In Trisko's affidavit, while admitting that he was one of the indorsers of the note, he in substance denied that when payment thereof had been refused by the makers, notice of that fact had in due time been given to him in writing or otherwise. In Trisko's own affidavit the facts in relation to this also admitting that he was one of the indorsers of the note, he in substance denied that he had in proper time received any notice of the maker's non-payment of the note, and alleged that the first notice or knowledge he had that the note was not paid was not until January 12, 1917. On the first plaintiff's called each of the defendants as a witness under section 32 of the Kentucky Code of and each gave testimony. Colman also testified in plaintiff's behalf as co-defendant. This fourth bill on direct and cross examination, Trisko and Trisko's own affidavit again testified and defendant also introduced certain notice or letter, dated Chicago, November 14, 1916, addressed to Trisko in Chicago and signed by the "Dear Loan & Mortgage Co.", under which name plaintiff was engaged in business in Chicago. The principal issue of fact upon the trial was whether or not plaintiff had given the notice to defendant, an indorser of the note, of payment or dishonor of the note by the makers, the makers of the note the evidence was somewhat conflicting. As we have reached the

conclusion that the verdict in favor of plaintiffs in manifestly against the weight of the evidence on this issue, that the trial court under the pleadings erred in admitting certain testimony of Goldman and in giving certain instructions to the jury, and that the judgment should be reversed and the cause remanded for another trial, we refrain from detailing and discussing the testimony of the several witnesses.

No appearance has been entered in this court or brief filed by plaintiffs. The main contention of counsel for defendants, as stated in their printed brief, is in substance that a preponderance of the evidence discloses that defendants, as indorsers, were not given by plaintiffs timely notice of the non-payment or dishonor of the note by its makers, the Kroons. We agree with the contention. (See, sections 88, 101 and 102 of the Negotiable Instrument Law of 1907, Cahill's Stat., Chap. 98, p. 1957; Tucker v. Mueller, 287 Ill. 551, 557-8; Calumet Trust & Savings Bank v. Bailey, 185 Ill. App. 545, 546; L. J. Anshen Co. v. Iglovitz, 202 Ill. App. 230, 232.)

On the trial, at the conclusion of all the evidence, plaintiffs' attorney moved for leave to file a second amended statement of claim "to conform with the proof." Upon objection of defendants' attorney, the motion was denied. Yet it appears in substance that plaintiffs' attorney, although in the first amended statement of claim (upon which the case was tried) there was no suggestion of any claim that defendants had waived the giving of timely notice of the dishonor of the note, succeeded in getting the trial court over objection to allow in evidence certain testimony of Goldman, as to alleged conversations had with Friede after the due date of the note, tending to show that Friede had waived such notice. And counsel for defendants further contend that the allowance of such testimony of Goldman in evidence, in view of the pleadings, constituted error. In

conclusion that the verdict is based on the evidence in this case, that the trial judge, in giving the jury instructions as the jury, and that the judgment should be reversed and the case remanded for another trial, we refrain from detailing and discussing the testimony of the several witnesses.

As appearance has been entered in this court at trial, filed by Plaintiff. The main contention of counsel for defendant, as stated in their printed brief, is in substance that a proper view of the evidence discloses that defendant, as defendant, was not given by Plaintiff timely notice of the non-payment or discharge of the note by its maker, the Bureau. A notice with the contention. (See, sections 85, 101 and 102 of the Tennessee Insurance Law of 1907, Cahill's Case, 38, p. 1007; Robert v. Bellamy, 287 Ill. 451, 227-8; Robert v. Bellamy, 287 Ill. 451, 227-8; Robert v. Bellamy, 287 Ill. 451, 227-8; Robert v. Bellamy, 287 Ill. 451, 227-8.)

On the trial, at the conclusion of all the evidence, Plaintiff's attorney moved for leave to file a second amended statement of claim "to conform with the facts." Upon objection of defendant's attorney, the motion was denied. Yet it appears in substance that Plaintiff's attorney, although in the first amended statement of claim (upon which the case was tried), there was no suggestion of any claim of non-payment or discharge of the note, and that the giving of timely notice of the discharge of the note, was not in giving the trial court over objection to allow in evidence certain testimony of defendant, as to alleged conversations with John Smith after the date of the note, tending to show that Smith had waived such notice. And counsel for defendant further contend that the admission of such testimony of defendant in evidence, in view of the Plaintiff's contention that, in

our opinion the contention has substantial merit. (See, Feder v. Midland Casualty Co., 316 Ill. 552, 559; S. Ward Hamilton Co. v. Channell Chemical Co., 327 id. 362, 363; Buckley v. Mandel Bros., 333 id. 368, 372; Altar Cabinet Co. v. Russell, 250 id. 416, 420-421.) In the Feder case it is said (p. 559):

"The object of a declaration in an action at law is to state the facts constituting the plaintiff's cause of action upon which he relies to recover, so as to enable the defendant to prepare his defense and meet the facts alleged with appropriate evidence. In order to recover the plaintiff must prove the case alleged in his declaration. It is a primary and elementary principle that a plaintiff can recover only on the case made in his declaration. He cannot make one case by his allegations and recover on a different case made by the proof. (Citing cases.) The defendant has a right to know what the plaintiff charges against him in order to properly make his defense and to prevent his being taken by surprise by the evidence at the trial."

Defendants' counsel also contend that the court erred in giving certain portions of the charge to the jury as to waiver. These portions, to which formal objection was made by defendants' attorney are (*italics ours*):

"The Court instructs the jury, as a matter of law, if you believe from the evidence in this case that even if the defendants did not get notice of the fact that they were endorsers of the note and they were being held liable by the plaintiff as endorsers of the note because the makers did not pay, yet, after receiving such notice they waived it by saying, 'We will pay the note anyway' or did anything, if the facts so indicate in this case which would lead you to believe that they waived the notice which is required by statute to give endorsers, either by agreeing to pay the note or by doing some overt act that would indicate to you that they had waived the question of receiving notice that they are endorsers, then, of course, their notice is waived under statute and under the law, and the plaintiff would not be entitled to recover, providing, however, that this phase of the plaintiff's case that the notice of endorsement had been waived by these two defendants must also be proved by the plaintiff by greater weight of evidence, he must convince you to that extent and if he has not done so he cannot avail himself of that situation in this case and cannot recover. The law, as far as the issues are involved here, is applicable to the facts concerning these two points. One is whether notice was given to the endorsers in accordance with the statute in such cases made and provided, and secondly, whether there was a waiver of that notice, and you gentlemen must determine from the evidence in this case and the facts as you heard them from the witness stand. The burden in that regard is on the plaintiff and he must satisfy you, if you take them into consideration, providing you do believe there is evidence to that effect and determine from the evidence in that regard what your verdict shall be."

We are also of the opinion, in view of plaintiffs' case

400-421. In the Index case it is said (p. 390):
 325 10, 328, 372; Index case v. Index, 325 10, 328, 372.
Index case v. Index, 325 10, 328, 372; Index case v. Index, 325 10, 328, 372.
 and Index the Index case v. Index, 325 10, 328, 372.

"The object of a declaration in an action is to state the facts constituting the plaintiff's cause of action upon which he relies to recover, so as to enable the defendant to prepare his defense and meet the facts alleged with appropriate evidence. In order to recover the plaintiff must prove the facts alleged in his declaration. It is a primary and necessary principle that a plaintiff who recovers only on the facts in his declaration. He cannot make any case by his declaration and recover on a different case made by the proof. (Citing cases.) The defendant has a right to know what the plaintiff charges against him in order to properly meet his defense and to present his being taken by surprise by the evidence at the trial."

Defendants' counsel also contend that the court erred in giving certain portions of the Index as to Index. These portions, to which formal objection was made by defendants' attorney are (Exhibit 100):

The Court instructed the jury, in a matter of law, if you believe from the evidence in this case that even if the defendant did not pay the note at the time it was due, and even if the note and they were being held liable by the plaintiff, and even if the note was due and the note was not paid, yet, after receiving such notice they failed to pay, they will pay the note anyway, or will pay the note in this case which would lead you to believe that they failed to pay the note which is required to give notice, either by giving notice to pay the note or by telling some agent and that agent failed to pay the note and they had the notice of receiving notice that they are endorsers, then, of course, their notice is waived under these circumstances, and the plaintiff could not be required to recover, and under the law, and the plaintiff could not be required to recover, provided, however, that this notice of the plaintiff's case that the notice of endorsement is not waived by the fact of endorsement, as was also proved by the plaintiff by proper weight of evidence, as was evidenced by the fact that it was not done so in this case, and the fact of that situation is that case and cannot recover. The fact as far as the facts are proved, is applicable to the facts concerning those two parties. The fact that notice was given to the plaintiff in such cases and the fact that there was a waiver of that notice, provided, not necessarily, that there was a waiver of that notice, and the defendant is not liable from the evidence in this case and the fact as you have known the other words. The parties in this regard to the plaintiff and he made a trial you, in this case, then in this case, provided you do believe that is evidence to that effect and consistent with the evidence in this regard and your verdict will be."

We are also of the opinion, in view of Index, that

as alleged in their first amended statement of claim, that the giving of these portions of the charge to the jury constituted reversible error.

For the reasons indicated the judgment in question against defendants, entered on January 16, 1932, is reversed and the cause is remanded.

REVERSED AND REMANDED.

Scanlan and Sullivan, JJ., concur.

as alleged in this first amended statement of claim, that the
 action of the Division of the Chief of the Jury constituted
 reversible error.

For the reasons indicated the judgment is reversed and
 against defendant, entered on January 10, 1932, is reversed and
 the case is remanded.

Very truly yours,

William H. Sullivan, Jr., Counsel.

37339

ARMANDA KAMMERER, LOUIS
KAMMERER and ANNA KAMMERER,
Appellees,

v.

METROPOLITAN LIFE INSURANCE
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

277 I.A. 625²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This suit was brought upon an insurance policy in the principal sum of \$1,000, issued by defendant on the life of Elizabeth Borrelli. At the close of all the evidence the court directed a verdict in favor of plaintiffs in the sum of \$1,000. Defendant has appealed from a judgment entered upon the verdict.

Plaintiffs allege in their statement of claim that defendant, on September 1, 1932, issued an insurance policy on the life of Elizabeth Borrelli and therein promised to pay to Anthony Borrelli, her husband, the sum of \$1,000 upon her death; that subsequently the plaintiffs became the sole beneficiaries of the policy; that Elizabeth Borrelli complied with all the terms of the policy, and that she died December 16, 1932, and proof of death was furnished to defendant but it refused to pay the sum due on the policy.

In its affidavit of merits defendant alleges that the policy was issued in consideration of the application, a copy of which was attached to the policy and made a part thereof; that the insured made the following declaration in said application:

"I hereby certify that I have read the answers to the questions in Part 'B' hereof before signing and that they have been correctly written as given by me and that they are

ARMAND R. KAMMERER, MOBILE
KAMMERER and KAMMERER, INC.
Appellants,

v.

METROPOLITAN LIFE INSURANCE
COMPANY, a corporation,
Appellee.

WITNESSES

STATE OF MISSISSIPPI

2381 A. 333

THE JUSTICE AGAIN REVERSED THE DECISION OF THE COURT.

This suit was brought upon an insurance policy in the principal sum of \$1,000, issued by defendant on the life of Elizabeth Bortwell. At the close of all the evidence the court directed a verdict in favor of plaintiff in the sum of \$1,000. Defendant has appealed from a judgment entered upon the verdict. Plaintiff alleges in their statement of claim that defendant, on September 1, 1935, issued an insurance policy on the life of Elizabeth Bortwell and therein promised to pay to Anthony Bortwell, her husband, the sum of \$1,000 upon her death; that subsequently the plaintiff became the sole beneficiary of the policy; that Elizabeth Bortwell complied with all the terms of the policy, and that she died December 16, 1935, and proof of death was furnished to defendant but it refused to pay the sum due on the policy.

In the affidavit of parties defendant alleges that the policy was issued in consideration of the application, a copy of which was attached to the policy and made a part thereof; that the insured made the following declaration in said application: "I hereby certify that I have read the contents of the question in Form 10, Manual before signing and that they have been correctly written as given by me and that they are

full, true and complete and that there are no exceptions to any such answers other than as above stated herein;"

that in said application the applicant was asked as to her present condition of health, to which question she replied, "Good;" that defendant alleges that the health of the applicant on said date was not good; that the applicant was further asked, "When last sick?" to which she replied, "Never;" that said answer was false; that she was further asked, "Have you any physical or mental defect or infirmity? Have you had any surgical operation, serious illness or accident? Have you ever been told that there was albumin, sugar or casts in your urine? Have you ever been told that you have any heart trouble? Have you ever had any of the following diseases: diabetes * * * disease of the heart? Have you been attended by a physician within the past five years? Have you ever had any treatment within the last five years at any hospital, dispensary or sanitarium?" to each of which questions she answered, "No," and that said answers were false. The affidavit of merits further alleges that all of said answers constituted misrepresentations as to material facts pertaining to the risk and that said questions and answers formed the basis for the issuance of the policy sued upon; that the policy issued pursuant to said misrepresentations was void and of no force and effect as an insurance contract, and that defendant is not liable to plaintiffs under said policy but that it is liable to plaintiffs for the return of the premium paid, in the sum of \$9.48, which was tendered to them and refused by them.

That a false representation in an application for an insurance policy as to a material fact affecting the risk to be assumed will avoid the policy and prevent recovery thereon, is not disputed.

Defendant has assigned four contentions in support of its argument that the instant judgment should be reversed and the

lull, true and complete and that there are no exceptions to any such answers other than as above stated herein.

That in said application the applicant was asked as to her present

condition of health, to which question she replied, "Good"; that

defendant alleges that the health of the applicant on said date was

not good; that the applicant was further asked, "What last night?"

to which she replied, "Never"; that said answer was false; that

she was further asked, "Have you any physical or mental defect or

infirmity? Have you had any surgical operation, serious illness

or accident? Have you ever been told that there was anything

wrong or amiss in your system? Have you ever been told that you have

any heart trouble? Have you ever had any of the following diseases

diabetes * * * disease of the heart? Have you been attacked by a

physician within the past five years? Have you ever had any treat-

ment within the last five years at any hospital, dispensary or

"sanatorium" to each of which question she answered, "No," and that

said answers were false. The affidavit of verities further alleges

that all of said answers constituted misstatements as to material

facts pertaining to the risk and that said questions and answers

formed the basis for the issuance of the policy sued upon; that the

policy formed pursuant to said misstatements was void and of no

force and effect as an insurance contract, and that defendant is not

liable to plaintiff's under said policy but that it is liable to

plaintiffs for the return of the premium paid, in the sum of \$5,000,

which was tendered to them and refused by them.

That a false representation in an application for an

insurance policy as to a material fact affecting the risk to be

insured will void the policy and prevent recovery thereon, is not

disputed.

Defendant has retained four counsel in support of

its argument that the instant judgment should be reversed and the

cause remanded, but in our view of this appeal it is not necessary to consider all of them.

Defendant contends that the court erred in sustaining objections to questions asked Anna Kammerer, one of the plaintiffs, called as a witness by defendant under section 33 of the Municipal Court Act.

The insurance policy sued upon is dated September 1, 1932, and was issued on the life of Elizabeth Borrelli, in consideration of the application attached thereto signed by her and dated August 6, 1932. She died December 16, 1932.

Dr. Lester S. Johnson, attended one Elizabeth Borrelli in July, 1930, at the West Side hospital. She was sick in bed when he saw her and he diagnosed her ailment as a heart insufficiency. It also appears from his testimony that he gave a certificate that she was also suffering from diabetes. Dr. A. F. Lash attended one "E. Borelle, 1745 Madison Street - age 47 - weight 135½ - height 59," and found her suffering from "vulvitis and fibroid of the uterus." Dr. Joseph S. Drabanski, the resident neurologist of the Cook County hospital, was an interne at that hospital on July 25, 1932. He graduated in medicine in 1931 but did not receive his license to practice until July, 1933. He testified that he saw "Elizabeth Borrelli" at the Cook County hospital on July 25, 1932, and made an examination of her. Defendant offered to prove by the witness that from his examination he diagnosed her trouble as a fibroid tumor of the uterus, that her foot "disclosed a recent ulcer," and that he referred her case to the gynecology department of the hospital; that she stated to him that she had been dieting for eleven years for diabetes. Plaintiffs objected to the offer "on the ground it is incompetent, irrelevant and immaterial," and the trial court sustained the objection. When defendant called

cause remained, but in our view of this appeal it is not necessary to consider all of them.

Defendant contends that the court erred in sustaining objection to questions asked (Mrs. Lester, one of the plaintiffs, called as a witness by defendant under section 33 of the Mississippi Code of 1906.

The insurance policy and upon it dated September 1, 1932, and was issued on the life of Elizabeth Bortell, in consideration of the application attached hereto signed by her and dated August 6, 1932. She died December 16, 1932.

Dr. Lester S. Johnson, attended one Elizabeth Bortell in July, 1930, at the time she was in the hospital. She was sick in bed when he saw her and he diagnosed her ailment as a heart insufficiency. It also appears from his testimony that he gave a certificate that she was also suffering from diabetes. Dr. W. T. Leah attended one "A. Bortell, 1745 Madison Street - age 47 - weight 155 - height 56," and found her suffering from vertigo and tinnitus of the hearing. Dr. Joseph M. Dechenault, the resident neurologist of the Cook County Hospital, was an intern at that hospital on July 22, 1932. He graduated in medicine in 1931 but did not receive his license to practice until July, 1932. He testified that he saw "Elizabeth Bortell" at the Cook County Hospital on July 25, 1932, and made an examination of her. Defendant offered to prove by the witness that from his examination he diagnosed her trouble as a fibroid tumor of the uterus, that her feet "disclosed a recent ulcer," and that he referred her over to the gynecology department of the hospital; that she agreed to him that she had been diabetic for eleven years for diabetes. Plaintiff objected to the offer "on the ground it is incompetent, irrelevant and immaterial," and the trial court sustained the objection. Her defendant called

Anna Kammerer it undertook to prove, by a series of questions, that her mother, the insured, was the person treated by Drs. Johnson, Lash and Drabanski, but the court sustained the objections of plaintiffs not only to the questions put, but to an offer of proof made by defendant. After a careful consideration of the record we are satisfied that the trial court committed reversible error in denying defendant a fair opportunity to prove, by Anna Kammerer, that the person treated by the said doctors was the mother of the witness, and the insured under the policy. The action of the court in instructing for plaintiffs was based, of course, upon the assumption that defendant failed to prove that the person treated by the doctors was the insured.

We may say, in conclusion, that there is considerable merit in the contention of defendant that even upon the evidence admitted by the court the case should have been submitted to the jury.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

37350

ONE LA SALLE STREET BUILDING
CORPORATION, an Illinois
corporation,

Appellee,

v.

THE FLORESHEIM SHOE COMPANY,
an Illinois corporation,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

277 I.A. 625³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An appeal from a judgment in the sum of \$11,975.49 in favor of plaintiff in a distress for rent proceeding. On motion of plaintiff the affidavit of merits to the second amended statement of claim was stricken and defendant elected to stand by it.

Plaintiff's second amended statement of claim alleges, in substance, that on October 8, 1930, the Illinois Improvement and Building Corporation (hereinafter called Building Corporation), being at that time the owner of a leasehold estate expiring in 2028, leased to defendant certain premises in said estate in the building known as One La Salle Building, Chicago, Illinois, for a term commencing January 1, 1931, and ending December 31, 1934; that defendant occupied the premises and paid the rent fixed by the lease up to and including August 31, 1932, but has failed to pay any rental since that time and that it owes the rent for the period from January 1, 1933, to and including July 1, 1933, in the sum of \$11,666.62; that on April 29, 1933, the original lessor assigned to plaintiff its leasehold estate including the building situated thereon, together with its lease with defendant

THE ILLINOIS TRUST COMPANY
INCORPORATED, an Illinois
corporation,

Appellee,

v.

THE ILLINOIS TRUST COMPANY,
an Illinois corporation,
Appellant.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF ILLINOIS

FILED FOR RECORD

227 I.A. 622

MR. JUSTICE ROBERTS DELIVERED THE OPINION OF THE COURT.

An appeal from a judgment in the sum of \$11,947.49 in favor of plaintiff in a district court proceeding. The action of plaintiff the ability of assets to the second amended statement of claim was returned and defendant also filed as stated by it.

Plaintiff's second amended statement of claim alleges, in substance, that on October 6, 1920, the Illinois Improvement and Building Corporation (hereinafter called Building Corporation), being at that time the owner of a leasehold estate existing in 2025, issued to defendant certain premises in said estate in the building known as the La Salle Building, Chicago, Illinois, for a term commencing January 1, 1921, and ending December 31, 1924; that defendant occupied the premises and paid the rent thereon the lease up to and including August 31, 1921, but has failed to pay any rental since that time and that it owes the rent for the period from January 1, 1922, to and including July 1, 1923, in the sum of \$11,947.49; that on April 27, 1923, the original lessor assigned to plaintiff the leasehold estate containing the Building situated therein, together with the lease and the interest

and all rights and claims accrued and to accrue by virtue of the lease; that plaintiff is the actual, bona fide holder of the lease and claim for rent; that on December 1, 1928, Building Corporation delivered to Straus National Bank and Trust Company, as trustee, its trust deed conveying its leasehold estate to secure its first mortgage bonds; that on June 30, 1932, the trustee filed its bill to foreclose, in the Circuit court of Cook county, and on July 1, 1932, the complainant in the foreclosure proceedings moved for the appointment of a receiver of the mortgaged premises and Building Corporation thereupon delivered a bond in lieu of the appointment of a receiver, in accordance with the statutes; that after the bond was filed and approved by the court Building Corporation remained in the sole, exclusive and undisturbed possession of the premises until April 29, 1933, on which date it assigned to plaintiff its interest in the mortgaged premises together with the lesser's interest in the lease sued upon and also all rights and choses in action for rent theretofore accrued. The statement then sets forth all the orders of the Circuit court in connection with the aforesaid proceedings verbatim. The statement further alleges that plaintiff thereafter remained and continued in the sole, exclusive and undisturbed possession of the premises; that plaintiff and Building Corporation have at all times had the complete and exclusive occupation and control of the premises and have employed, on their own account and not as agents for others, the persons operating the premises and the building thereon, and that no other person or corporation, during all of said time, has asserted a right to or secured the possession, occupation or control of or physical authority over the premises; that on August 5, 1932, defendant was informed of the institution of the foreclosure proceedings, of the application for the appointment of a receiver, and the order of the Circuit court entered July 1, 1932, permitting Building Corporation to remain in possession of the mortgaged

premises, and that Building Corporation was then still in possession of the same; that knowing these facts defendant paid to Building Corporation rent for the demised premises for the months of June, July and August, 1932, and continued to pay to Building Corporation and to plaintiff, in accordance with the terms of the written indenture of lease, various sums of money for electricity consumed by defendant upon the demised premises, the last of such payments being made on July 14, 1933.

Defendant's affidavit of merits to the second amended statement of claim admits entering into the lease described by plaintiff, dated October 8, 1930; admits that it took possession and paid the rent up to and including August 31, 1932, but expressly denies that there is now due and owing from defendant to plaintiff or to Building Corporation any sum or sums of money whatsoever for rental or otherwise; denies that plaintiff is the actual, bona fide holder of defendant's lease and of a claim for the rents thereunder, but states the fact to be that defendant's lease was terminated on or about July 1, 1932, by the entering into possession of the demised premises by the Straus National Bank and Trust Company of Chicago, as trustee under the trust deed between it and Building Corporation dated December 1, 1928. The affidavit of merits then sets up the execution of said trust deed whereby Building Corporation conveyed its leasehold estate to Straus National Bank and Trust Company of Chicago, as trustee, to secure its certain issue of first mortgage bonds, and avers that thereafter Building Corporation defaulted in the performance of certain covenants in the trust deed on its part required to be performed, and that thereupon the trustee filed its bill to foreclose the trust deed, on June 30, 1932, in the Circuit court of Cook county. The affidavit of merits then sets up certain provisions in the trust deed that gave the trustee power upon condition broken to enter into possession of the premises and to collect

premises, and that building corporation was then still in possession of the same; that knowing these facts being as aforesaid, corporation went for the purpose of selling for the purpose of time, July and August, 1934, and continued to pay to building corporation and to plaintiff, in accordance with the terms of the written instrument of lease, various sums of money for building corporation by corporation when the building corporation, the first of such payments being made on July 1st, 1934.

Defendant's affidavit of service of notice to the building corporation of claim against corporation, into the hands of plaintiff by plaintiff, dated October 6, 1934, admits that it took possession and held the same up to and including August 11, 1934, and on or about August 11, 1934, that there is now the same being held by plaintiff as to the building corporation and sums of money in answer for rental or otherwise; that plaintiff is the owner, from this date of defendant's lease and of a claim for the same thereunder, but states the fact to be that defendant's lease was terminated on or about July 1, 1934, by the writing into possession of the building corporation by the same building corporation and then company of Chicago, as trustee under the first lease, and building corporation dated December 1, 1934. The affidavit of service of notice then sets up the execution of said first lease thereby building corporation conveyed the leasehold estate to said first lease and that company of Chicago, as trustee, to secure the same lease at first mortgage bonds, and avers that plaintiff building corporation defaulted in the performance of certain covenants in the lease and so the same required to be performed, and that corporation the same failed to bill to plaintiff the same bond, on June 30, 1934, in the amount of \$1000.00. The affidavit of service then sets up certain provisions in the first lease that gave the trustee power upon condition broken to enter into possession of the premises and to collect

the rents; avers that by virtue of these provisions the trustee, on July 1, 1932, entered into possession of the building known as One La Salle Street Building and of the premises devised to defendant, and thereafter made Building Corporation its agent to manage the building and collect the rents, obligating Building Corporation to turn over all the rentals collected by it to the trustee and restraining Building Corporation from making new leases or modifying or cancelling existing leases without the written consent of the trustee, and avers that by virtue of this arrangement Building Corporation was deprived of all the incidents of ownership and made a mere agent and custodian for said trustee, and that said trustee still remains in possession of said property, including that portion thereof devised to defendant. Defendant then denies knowledge of the various court orders entered in the foreclosure proceedings as set forth in the second amended statement of claim, and denies that it is bound by any of said orders or decrees inasmuch as it was not and is not a party to the proceedings; denies that Building Corporation was on and after July 1, 1932, in sole and undisputed possession of the premises, and denies that plaintiff was in sole and undisputed possession of said premises on and after April 29, 1933, but states the fact to be that on and after July 1, 1932, Straus National Bank and Trust Company of Chicago, as trustee, was in possession of the premises as trustee under the terms of the trust deed for condition broken, and avers that by reason of the entry of the trustee and the assertion of its title and right to such possession, which title was and is paramount and superior to the title and right of possession then held by Building Corporation, the lease then existing between defendant and Building Corporation was then terminated, cancelled and brought to an end, and that upon first becoming aware of these facts in August, 1932, defendant refused to pay further rent to

Building Corporation and advised it that by virtue of the facts hereinabove stated the lease was cancelled and terminated and that defendant was no longer its tenant. Defendant then denies that it has performed any act or acts in recognition of the lease since it first became aware of the entry of the trustee during August, 1932.

The sole question presented is whether or not defendant's affidavit of merits to the second amended statement of claim makes out a prima facie defense.

Defendant thus states its theory of the case: "It is the contention of the defendant that the entry into possession by the Trustee, which must be taken as admitted under the pleadings, cancelled and terminated the lease of this defendant with the Illinois Improvement and Building Corporation. This being so, all rights to a cause of action of distress for rent or to relief under the lease have terminated or at least passed from the Illinois Improvement and Building Corporation, the original mortgagor. It is not conceivable how the lease being terminated by the entry of the Trustee, the original lessor or its assignee have the right to bring this action against the defendant. If any right exists to bring an action for distress for rent or other relief against this defendant by virtue of its occupancy of the premises, that right, if any, is not in the plaintiff. Whether or not it has passed to the Trustee need not be considered, inasmuch as the Trustee is not a party to this suit. * * * The entry of the trustee into possession for condition broken is an assertion of title paramount and terminates all leases subsequent to the trust deed as a matter of law." Defendant cites numerous cases in support of its position. We need cite only certain Illinois cases relied upon: Gartside v. Outley, 58 Ill. 210, 214; Taylor v. Adams, 115 Ill. 570, 575; Montanye v. Callahan, 84 Ill. 355, 358; Stubbings v. Village of Evanston,

136 Ill. 37, 41; Sohn v. Royal Hotel Co., 232 Ill. App. 60, 74; Greenebaum Sons Bank & Trust Co. v. Kingsbury, 248 Ill. App. 321, 332 (decided by this branch of the court). Plaintiff, in its brief, makes no attempt to answer defendant's argument as to the legal effect upon leases made subsequent to the trust deed, of an entry into possession by a trustee for condition broken. Its sole response to defendant's contention is that "the allegations in the affidavit of merits relating to the alleged taking of possession by the trustee under the senior trust deed, are mere conclusions of the pleader and therefore insufficient to constitute a defense."

The form of the pleadings of the Municipal court of Chicago is prescribed by the rules of that court. Paragraph (b) of Rule 15 provides:

"Every pleading shall contain a concise statement of the ultimate facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved." (Italics ours.)

Paragraph (c) of the same rule, in prescribing what an affidavit of defense shall contain, provides:

"Such affidavit shall contain a concise statement of the ultimate facts constituting the defense." (Italics ours.)

In support of its position plaintiff argues that "a pleading which relies upon an actual change of possession of real estate must contain allegations showing specific acts constituting the change of possession, as "it is not sufficient merely to allege that the party 'went into possession' or 'took possession,'" as "such allegations are only conclusions." In support of its position plaintiff relies upon Grove v. Templin, 320 Ill. 597. That case, in our judgment, has no bearing upon the sufficiency of the instant pleading. There the cross-complainant sought to have enforced an alleged oral agreement for the conveyance of real estate, in consideration for personal services alleged to have been rendered

by the cross-complainant to the cross-defendants' intestate. In its opinion the court states (pp. 603-4):

"An oral agreement to convey real estate in consideration of services to be rendered must be clear, definite and unequivocal in its terms, and a bill to enforce such an agreement must allege the terms directly, clearly and precisely and must also show what has been done in performance of the agreement. To take such a contract out of the operation of the Statute of Frauds by reason of its part performance and the making of lasting and valuable improvements the acts of part performance must be clearly shown, and they must be such as cannot, under the circumstances, be fairly compensated in an action at law and such that to allow the defense of the Statute of Frauds would be a virtual fraud on the party seeking performance of the contract. (Gladville v. McDele, 247 Ill. 34.) Whether the specific performance of a contract will be decreed depends largely upon the particular facts in each case, and in a bill which seeks specific performance the facts must be stated so definitely and clearly that the court can determine from the bill whether the contract is fair, just and not unconscionable and whether the circumstances are such that equity requires that the contract should be specifically enforced. (Edwards v. Brown, 308 Ill. 350; Davies v. Kaiser, 280 Id. 334.)"

The court points out, at some length, the absence of a number of allegations essential in a case that sought to take a contract out of the operation of the Statute of Frauds, but the instant case involves an action at law and the rules of the Municipal court require only a statement of the ultimate facts, "but not the evidence by which they are to be proved." To allege possession is to allege an ultimate fact, and such an allegation is sufficient under the rules of the Municipal court. That the plaintiff so considered the meaning and effect of the use of the word possession in a pleading in the Municipal court is evidenced by the fact that in its second amended statement of claim it uses the word possession in the same sense as it is used by defendant in its affidavit of merits. As has been often stated, a defendant, in an affidavit of merits in the Municipal court, is not required to state the evidence upon which he relies as a defense, but only ultimate facts which give notice of the nature of his defense. That plaintiff in the instant case was fairly apprised of the nature of the defense cannot be seriously questioned.

Plaintiff further contends that "the affidavit of merits

is fatally defective because none of the allegations contained therein purport to be the allegations of the person who signed and verified the affidavit of merits." We have considered this contention and find it without merit.

There is much force in the argument of defendant that plaintiff is here attempting to support an erroneous judgment of the trial court upon mere technical grounds.

The order of the Municipal court of Chicago striking defendant's affidavit of merits to the second amended statement of claim and entering judgment against defendant is reversed and the cause is remanded to the Municipal court with directions for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Grisdley, P. J., and Sullivan, J., concur.

is likely that we had used some of the same
 names as the others at the same time and place
 and visited the same places of interest.
 condition and time of day.

There is much more in the report of the
Committee on the subject of the
of the Committee on the subject of the

[illegible][illegible]

7-10-68

37388

MARY SUSANNA MILLER,
Appellant,

v.

JOHN W. SUTHERLAND,
Appellee.

APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

277 I.A. 625¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

We are advised, but not from the common law record, that Mary Susanna Miller, plaintiff, obtained a judgment by confession upon a promissory note against John W. Sutherland, defendant. Defendant filed a verified "motion to set aside the judgment by confession," and an order was entered granting him leave to plead to the declaration, the judgment to stand as security. Later, a verified petition entitled Mary Susanna Miller v. John W. Sutherland, Superior court of Cook county No. 574961, was filed, which alleges that certain statements contained in the affidavit filed by defendant upon the motion to set aside the judgment were false and untrue and were made by defendant for the purpose of deceiving and misleading the court upon the motion to vacate. The petition prayed "that a rule be entered on John W. Sutherland to show cause why he should not be committed for contempt," and thereafter such a rule was entered. Defendant filed a verified answer to the rule. Thereafter defendant, upon leave of court, filed an amended answer to the rule. Upon the hearing of the rule the trial court entered an order dismissing the petition and discharging defendant, and plaintiff has appealed from that order.

Proceedings for contempt of court are of two classes, - those which are criminal in their nature, sometimes called common

MARY JOSEPHINE MILLER, Plaintiff,
vs.
JOHN W. WITH BRADY, Defendant.

2771.A.625

MR. JUSTICE VICTOR ARNOLD on the motion of the defendant.

It was advised, but not from the woman but from the fact that Mary Josephine Miller, plaintiff, obtained a judgment by confession upon a promissory note against John W. With Brady, defendant. Defendant filed a verified motion to set aside the judgment by confession, and an order was entered granting him leave to plead to the declaration, the judgment to which he submitted. Thereafter, a verified petition entitled Mary Josephine Miller v. John W. With Brady, reporter court of Cook county No. 27621, was filed, which alleges that certain statements contained in the affidavit filed by defendant upon the motion to set aside the judgment were false and untrue and were made by defendant for the purpose of deceiving and misleading the court upon the motion to vacate. The petition prays "that a rule be entered on John W. With Brady to show cause why he should not be committed for contempt," and the court made a rule as requested. Defendant filed a verified answer to the rule. Thereafter defendant upon leave of court, filed an amended answer to the rule. Upon the hearing of the rule the trial court entered an order dissolving the petition and dismissing defendant, and plaintiff has appealed from that order.

Procedural for contempt of court was of two classes, - those which are criminal in their nature, sometimes called common

law contempts, and those which are intended as purely civil remedies, which ordinarily arise out of the alleged violation of some order entered in the course of a chancery proceeding.

"Generally, it may be said that a criminal contempt embraces all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority." (7 Am. & Eng. Ency. of Law (2d) p. 28.)

"Civil Contempt. - When a person fails or refuses to do something which he has been ordered to do for the benefit of the opposite party to the cause, the punishment, when by imprisonment, is for the purpose of coercing the performance of the act, or when by fine, it is usually for the purpose of having it go to the opposite party as an indemnity for the damage suffered by him on account of the failure of his adversary to comply with the order. In both of these cases the contempts are civil." (Id. p. 29.)

The alleged contempt in the instant case is a criminal contempt.

There is no force in the argument of plaintiff that because the trial court, in passing upon the motion of defendant to vacate the judgment, had the right to exercise equitable principles that the instant contempt proceeding must be regarded as a civil contempt, and that, therefore, the sworn answer of defendant to the rule to show cause did not entitle him to a discharge, even though it sufficiently denies the facts upon which the charge is based.

This being a criminal contempt the proceedings should have been in the name of The People. (Rawson v. Rawson, 35 Ill. App. 505, 507; People v. O'Meara, 216 Ill. App. 173, 174.)

The rule is well settled in this state that all criminal prosecutions sought to be reviewed must be by writ of error. (See People v. O'Meara, supra, 175.) Here the plaintiff in the original case has appealed.

In People ex rel. Blumie v. Neill, 74 Ill. 68, the court said (p. 69):

"But this is a prosecution in behalf of the people, and the proceeding for a contempt is in the nature of a criminal proceeding. Stuart v. The People, 3 Scam. 395. The people are not allowed an appeal or writ of error in a criminal case.

law courts, and those which are intended as purely civil remedies, which ordinarily arise out of the alleged violation of some order entered in the course of a summary proceeding.

Generally, it may be said that a criminal contempt embraces all acts committed against the majesty of the law, and the primary purpose of such punishment is the vindication of public authority." (7 Am. & Eng. Rev. of Law (2d) p. 22.)

"Civil Contempt." - When a person fails or refuses to do something which he has been ordered to do for the benefit of the opposite party to the cause, the punishment, when by imprisonment, is for the purpose of coercing the performance of the act, or when by fine, it is awarded for the purpose of having it do to the opposite party as an indemnity for the damage suffered by him on account of the failure of his adversary to comply with the order. In both of these cases the contempt is civil." (Id. p. 22.)

The alleged contempt in the instant case is a criminal contempt. There is no force in the argument of plaintiff that because the trial court, in passing upon the motion of defendant to vacate the judgment, had the right to exercise equitable principles that the instant con-

tempt proceeding must be regarded as a civil contempt, and that, therefore, the sworn answer of defendant to the writ is not a use did not entitle him to a discharge, even though it might be deemed the facts upon which the charge is based.

This being a criminal contempt the proceedings should have been in the name of the People. (Lawson v. Lawson, 26 Ill. App. 328, 307; People v. Barker, 216 Ill. App. 173, 174.)

The writ is well settled in this state that all criminal proceedings ought to be reviewed and be by writ of error. (See People v. [unclear], 175.) Here the plaintiff in the original case has appealed.

In People v. [unclear], 216 Ill. App. 173, the court said (p. 173):

"But this is a proceeding in behalf of the People, and the proceeding for a contempt is in the nature of a criminal proceeding. In People v. [unclear], 216 Ill. App. 173, the People are not allowed an appeal or writ of error in a criminal case."

Besides, it is the general rule, that the sole adjudication for contempt, and the punishment thereof, belong exclusively and without interference, to each respective court. We are of opinion the acquittal of the defendants by the court below must be held to be conclusive."

See also Craig v. McCulloch, 20 W. Va. 148, wherein the court said (pp. 153-4):

"A reference to the facts hereinbefore stated will show, that the judge, against whose order the alleged contempt was committed, has expressly decided, that no contempt had been committed. This action is conclusive. Proceedings for the punishment of contempt are in their nature criminal, and while an appeal to this Court lies in cases of conviction, no appeal lies from an acquittal. And, moreover, the power of a court or judge to punish for contempt is arbitrary and discretionary with the court or judge against whom, or whose orders, the offence has been committed. Code chapter 160 § 4. And the judge in this case having heard the parties and decided that no offence had been committed, this Court has no jurisdiction to review that decision. Ex parte Burtis, 13 Otto 238; Mason v. H. F. Bridge Co., 16 W. Va. 874.)" (See also Commonwealth v. Richardson, 136 Ky. 699, 702.)

The instant appeal must be dismissed, and we may say, in conclusion, that even if plaintiff had sued out a writ of error it would have availed her nothing.

APPEAL DISMISSED.

Gridley, F. J., and Sullivan, J., concur.

37398

ALICE LOUISE KINNEY,
Appellee,

v.

CITY OF CHICAGO, a
Municipal Corporation,
et al.,
Defendants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

277 I.A. 625⁵

CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Alice Louise Kinney sued City of Chicago, a municipal corporation, and U. S. Contracting and Engineering Company, a corporation, in case. There was a trial before the court and a jury, and at the close of plaintiff's case the court directed a verdict in favor of the U. S. Contracting and Engineering Company. The jury returned a verdict of guilty as to the City of Chicago and assessed plaintiff's damages in the sum of \$750. From a judgment entered upon the verdict the City of Chicago has appealed.

The U. S. Contracting and Engineering Company was engaged in the contracting and paving business and at the time in question, to wit, May 12, 1930, in the course of its business, opened certain holes in Seminary avenue at its intersection with Webster avenue, in Chicago, for the purpose of installing beneath the surface of the street certain pipes, conduits and gas connections, and then installed in the said holes the said pipes, etc., and plaintiff claims, in her declaration, that defendants carelessly and negli-

37308

ALICE LOUISE KIRBY,
Appellee,

v.

CITY OF CHICAGO, a
Municipal Corporation,
et al.,
Defendants.

CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

NO. 37308, LOUISIANA - IN THE SUPREME COURT OF THE UNITED STATES.

Alice Louise Kirby and City of Chicago, Appellees.

corporation, and U. S. Contracting and Engineering Company, a
corporation, in case. There was a trial before the court and
a jury, and at the close of Plaintiff's case the court directed
a verdict in favor of the U. S. Contracting and Engineering
Company. The jury returned a verdict of \$100,000 in the City
of Chicago and assessed Plaintiff's damages in the sum of \$100,000.
From a judgment entered upon the verdict the City of Chicago

has appealed.

The U. S. Contracting and Engineering Company was engaged
in the contracting and paving business and at the time in question,
to wit, May 12, 1930, in the course of its business, opened certain
holes in Germany Avenue at the intersection with Webster Avenue,
in Chicago, for the purpose of installing beneath the surface of the
street certain pipes, conduits and gas connections, and then in-
stalled in the said holes the said pipes, etc., and Plaintiff
claims, in her petition, that defendant unlawfully and negli-

277 I.A. 025

RECEIVED BY THE
CITY OF CHICAGO

gently suffered and permitted the said holes to remain depressed after the installation without properly filling up the holes and without restoring the street to a reasonably safe level and smooth condition, and that plaintiff, while in the exercise of due care on her part, stepped into one of the holes, "and tripped and stumbled over and against certain of the street and jagged edges of the cement or asphalt therein," by means of which she was injured, etc.

Defendant contends that the trial court erred in refusing to direct a verdict for defendant and in support of the contention strenuously argues that the evidence for plaintiff shows that she was not in the exercise of ordinary care for her own safety at the time of and just prior to the accident. After a careful consideration of this contention we have reached the conclusion that it should not be sustained, although it must be conceded that the contention is not without some force.

In support of a further contention that the verdict is against the manifest weight of the evidence, defendant argues that the finding of the jury that plaintiff at the time of the accident and just prior thereto was in the exercise of ordinary care for her own safety, is clearly against the manifest weight of the evidence. After a careful consideration of this contention we have reached the conclusion that it must be sustained. As the case may be tried again we purposely refrain from commenting upon the facts and circumstances that bear upon the instant contention.

The judgment of the Superior court of Cook county is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

...and ...
 after the installation ...
 without ...
 condition, and ...
 for ...

...and ...
 ...
 ...

...
 ...
 ...
 ...

...
 ...
 ...

...
 ...
 ...
 ...

...
 ...
 ...
 ...

...
 ...
 ...

...
 ...
 ...

36942

S. P. JOHNSTON,
Defendant in Error,

v.

ROBERT H. ANTHONY,
Plaintiff in Error.

ERROR TO CIRCUIT COURT,

COOK COUNTY.

277 I.A. 6261

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant, Robert H. Anthony, seeks to reverse a judgment for \$18,375.13 entered against him in favor of plaintiff, S. P. Johnston, in a cause tried by the Circuit court without a jury. The court also found the issues against defendant on his four pleas of set-off.

Defendant's declaration consisted of the common counts and a special count supported by an affidavit of plaintiff's claim. There was also filed with the declaration what purported to be a statement of the account between the parties.

Plaintiff's special count alleged that he engaged defendant as sales agent on a commission basis for the sale of lots in plaintiff's subdivision known as Lilymoor in McHenry county, Illinois; that during the term of the agency he advanced sums of money to defendant and the latter retained down payments made on the purchase of lots aggregating a large sum of money; that defendant agreed that at the termination of the agency, should the advancements made by plaintiff and the aggregate of the down payments retained by defendant exceed the total commissions and credits earned by him, he would return to plaintiff such excess; that at the termination of the agency the advancements made by plaintiff to defendant and the down payments

U. S. District Court
Southern District of New York

v.

ROBERT E. BROWN,
Defendant.

U. S. District Court
Southern District of New York

Mr. Justice delivered the opinion of the court.

BY this writ of error defendant, Robert E. Brown, seeks

to reverse a judgment for \$10,000.00 entered against him in favor

of plaintiff, E. J. Johnston, in a case tried by the circuit

court without a jury. The case also found the taxes against

defendant on his own plea of self-defense.

Defendant's decision consists of the common counts

and a special count supported by an affidavit of plaintiff's officer.

There was also filed with the decision a report by the

statement of the account between the parties.

Plaintiff's special count alleged that he engaged defendant

as an agent on a commission basis for the sale of lots in plaintiff's

city's subdivision known as Brown's in Woodbury County, Illinois;

that during the term of the agency he received from it money to

defendant and the latter retained from payments made on the purchase

of lots representing a large sum of money; that defendant agreed that

at the termination of the agency, should the subdivision be sold

plaintiff and the proceeds of the sale were to be divided by defendant

and exposed the total commission and credits against by him to plaintiff

return to plaintiff such amount; that at the termination of the agency

the advancement made by plaintiff to defendant and the sum payments

retained by him exceeded the total commissions and credits due him by \$18,470.75; that although plaintiff has demanded of defendant the payment of this amount he has refused to pay same; and that his claim is for the above amount due and owing to him from defendant.

Defendant filed a plea of the general issue and four special pleas of set-off based, respectively, on the four different contracts involved in this proceeding.

The first contract between the parties was executed August 17, 1927, and is as follows:

"R. H. Anthony agrees to devote all his time and effort to the sale of the Lilymoor Subdivision both personally and with any organization he may be able to create.

S. P. Johnston agrees to pay to R. H. Anthony twenty-five per cent on all sales made and accepted, it being understood that R. H. Anthony is to pay all sub-salesmen from this account as he may see fit. In the event of any sales being made where the down payment is less than twenty-five per cent of the sales price, the deficiency of the payment as compared to the twenty-five per cent shall be payable one-half to Anthony and one-half to be retained by Johnston as received.

The said S. P. Johnston further agrees to pay to the said R. H. Anthony as additional compensation for his services in this behalf the sum of Two Hundred (\$200.00) per week for ten (10) consecutive weeks, with the express understanding that the said R. H. Anthony will use one-half of the said \$200.00 per week for advertising purposes, in and about the sale of lots in the Lilymoor Subdivision. It is expressly understood that the sum of \$200.00 per week, as herein set forth, shall be an advance by S. P. Johnston to be charged to said Anthony's commission account, but in the event his commission account shall fall short of the total of said advance, the balance shall be charged off.

It is further agreed that should R. H. Anthony sell over \$20,000 in total sales on the above property within the said period, that he is to have an exclusive sales contract for a period of one year, at the same rate of commission and at a total sales price not to exceed \$450,000.00.

S. P. Johnston
Robt. H. Anthony."

The second contract entered into March 1, 1928, for the period ending December 1, 1928, after setting forth defendant's employment, the commissions to be received by him and the method and manner of their payment, provided:

"S. P. Johnston further agrees to advance R. H. Anthony for advertising, signs, transportation, parties, printing and office expenses, not to exceed \$5,000, which is to be charged against Anthony's commission account and which is to be advanced in the following manner:

retained by him exceeded the total commission and charges due him by 18,70.75; that although claimant has admitted that the amount of this account has been received by him, and that the claim is for the above amount but not owing to him from defendant, defendant filed a plea of the general issue and two special pleas of set-off based, respectively, on the two different contracts involved in this proceeding.

The first contract between the parties was executed about

17, 1927, and is as follows:

"R. H. Anthony agrees to devote all his time and effort to the sale of the Allynwood subdivision both personally and with any organization he may be able to create.
S. P. Johnston agrees to pay to R. H. Anthony twenty-five per cent on all sales made and accepted, if being understood that R. H. Anthony is to pay all expenses from this account as he may see fit. In the event of any sales being made hereinafter, the amount is less than twenty-five per cent of the sales price, the deficiency of the payment is considered to the twenty-five per cent shall be payable hereafter to Anthony and one-half to be retained by Johnston as receiver.
The said S. P. Johnston further agrees to pay to the said R. H. Anthony an additional commission for his services in this subdivision the sum of Two Hundred (\$200) per year for ten (10) consecutive years, with the expense hereinafter provided that the said R. H. Anthony will use one-half of the said \$200.00 per year for advertising purposes, in and about the sale of lots in the Allynwood subdivision, it is expressly understood that the sum of \$100.00 per year work herein set forth, shall be an advance by S. P. Johnston to the said R. H. Anthony's commission account, and in the event his commission account shall fall short of the total of said advance, the balance shall be charged off.
It is further agreed that should R. H. Anthony sell over \$20,000 in total sales on the above property within the said period, that he is to have an exclusive sales contract for a period of one year, at the same rate of commission and at a total sales price not to exceed \$25,000.00.

S. P. Johnston
Wm. E. Anthony

The second contract, entered into March 1, 1928, for the period ending December 1, 1928, after setting forth defendant's obligations, the commissions to be received by him and the method and amount of payment, provided:
"S. P. Johnston further agrees to advance R. H. Anthony for advertising, travel, transportation, printing and other expenses, not to exceed \$5,000, which is to be charged against Anthony's commission account and which is to be advanced in the following manner:

| | |
|-----------|--------|
| March | \$ 400 |
| April | 400 |
| May | 600 |
| June | 1000 |
| July | 1000 |
| August | 600 |
| September | 400 |
| October | 200 |
| November | 100 |
| December | 100 |

In addition Anthony is to have a personal drawing account of \$250 per month and a sub-salesman's drawing account of one-half of the down payment of each contract.

In the event that Anthony's Commission account at the termination of this contract shall fall short of the advances Anthony at his option shall give Johnston cash or a note (for a reasonable length of time) to balance his account. Any commission credits accruing thereafter shall be paid in cash to Anthony if he shall have balanced his account with a cash payment, or shall be credited on his note if he gives a note for settlement.

S. P. Johnston
Robert H. Anthony."

The third contract between the parties was executed January 1, 1929, for the year ending December 31, 1929, and, after reciting defendant's employment by plaintiff, the commissions he was to receive, and the method and manner of payment, provided:

"S. P. Johnston further agrees to advance R. H. Anthony for advertising, signs, transportation, parties, printing, office expenses, personal expenses, etc., not to exceed \$3,000, which is to be charged against Anthony's commission account and which is to be advanced at not more than \$500 per month.

In the event that Anthony's commission account at the termination of this contract shall fall short of the advances, Anthony at his option shall give Johnston cash or a note payable on or before December thirty-first, 1931, and secured by an insurance policy. Any commission credits accruing thereafter shall be paid in cash to Anthony if he shall have balanced his account with a cash payment, or shall be credited on his note if he gives a note for settlement.

S. P. Johnston
Robt. H. Anthony."

The fourth contract was in the following form:

"January 1, 1930.

Mr. Robert H. Anthony:

Dear Sir:

In consideration of the sum of One Dollar, receipt acknowledged, I hereby give you exclusive sales agency of my property, described as the Lilymoor Subdivision, McHenry County, Illinois, for the period May 1, 1930 to April 30, 1931, but subject to the followings:

You are to have 40% commission on all deals accepted by me, retaining up to 25% of sale price, at which time contracts are to be signed and

the balance of 15% to be credited you at the rate of one-half of the subsequent monthly payments as made.

I agree to advance you \$200.00 each month, (except Sept. 1930 and April 1931) same to be returned on or before December 31st, 1931.

In the event I make a selling contract with another organization I may cancel this contract by giving you 30 days notice.

I reserve the privilege to sell any lots in above subdivision myself or thru any salesmen I may have working from my Evanston office, provided such deals are not made from your leads or as a result of your efforts.

S. P. Johnston
R. H. Anthony."

The case went to trial before the court and a jury March 27, 1933. The trial proceeded until March 29, 1933, when defendant agreed that a certain auditor's report presented by plaintiff purporting to show correctly all of the transactions between the parties, commencing with the first contract of employment, might be filed by plaintiff as an amended bill of particulars, and upon agreement of the parties a juror was withdrawn, the jury discharged and the court proceeded to try the cause without a jury. In order to afford defendant an opportunity to examine and check plaintiff's auditor's report the cause was continued until April 24, 1933. Upon the resumption of the trial on that date a stipulation was admitted in evidence, the pertinent portions of which are as follows:

"It is hereby stipulated and agreed by and between the parties hereto, that the amended bill of particulars heretofore filed by the plaintiff may be amended as to certain items as follows: * * * (Items to be amended follow.)

It is further stipulated and agreed by and between the parties hereto that (upon) the amended bill of particulars as amended (and) * * * upon the four contracts involved in the subject matter of this litigation, copies of which contracts are appended to the special pleas numbered '2,' '3,' '4,' and '5,' filed by the defendant, Robert H. Anthony, the account between the parties as stated in the amended bill of particulars as then amended, will stand as prima facie; the totals with reference to 'Earned Commissions,' 'Down Payments retained by Robert H. Anthony,' 'Advanced (advances) Made to Robert H. Anthony' being as follows:

(a) That Robert H. Anthony earned as commissions the various sums of money set forth in the amended bill of particulars, as amended, totaling the sum of \$32,254.59.

(b) That Robert H. Anthony retained from down payments made by various contract purchasers whose names are set forth in the amended bill of particulars, as amended, various sums of money set forth in the amended bill of particulars, as amended, totaling the

The balance of 1935 to be credited you as the date of the bill of the subsequent monthly payments be made.

I agree to advance you \$100.00 each month (except Sept., 1935 and April 1936) to be received on or before the 1st of each month.

In the event I make a selling contract with another organization I may cancel this contract by giving you 30 days notice.

I reserve the privilege to sell any lots in Iowa and Illinois and if or then an agreement may have coming from the Illinois office, provided such sales are not made from your lots or as a result of your efforts.

E. W. Johnson
H. W. Johnson

The case went to trial before the court and a jury in 1935.

At 1936. The trial proceeded until March 11, 1936, when defendant

agreed that a certain number of reports furnished by plaintiff per-

taining to show correctly all of the transactions between the parties,

concerning with the trial of defendant, which he filed by

plaintiff as an amended bill of particulars, and upon agreement of the

defendant a jury was returned, and jury discharged and the court pro-

ceeded to try the case at New York City. In order to afford defendant

an opportunity to examine and check plaintiff's exhibits, report the

case was continued until April 11, 1936. Upon the completion of

the trial on that date a stipulation was admitted in evidence, the

plaintiff's position of which are as follows:

"It is hereby stipulated and agreed by and between the parties hereto, that the number bill of particulars heretofore filed by the plaintiff may be amended as to certain items as follows: * * * (Items to be amended follow):

It is further stipulated and agreed by and between the parties hereto that (upon) the number bill of particulars as

amended (and) * * * upon the last report the involved in the sub-

ject matter of this litigation, copies of which were the

appended to the original bill of particulars numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

(b) That Robert M. Johnson retained from 1935 to present date various contract payments to which names are set forth in the amended bill of particulars, as amended, various items of money set forth in the amended bill of particulars, as amended, totaling the

the sum of \$15,281.00; that such sum of \$15,281.00 was not afterwards paid to the plaintiff, Samuel P. Johnston, by the defendant, Robert H. Anthony, * * * neither has the same been paid to the plaintiff, Samuel P. Johnston, nor has any part thereof been paid to the plaintiff, Samuel P. Johnston.

(c) That the plaintiff Samuel P. Johnston paid various sums of money set forth in the amended bill of particulars, as amended to the defendant Robert H. Anthony, totaling the sum of \$35,348.72; that Robert H. Anthony received from the plaintiff, Samuel P. Johnston, various sums of money paid to Robert H. Anthony totaling the sum of \$35,348.72, as set forth in the amended bill of particulars as amended.

It is further stipulated and agreed that the various contract purchasers, whose names are set forth and mentioned in the amended bill of particulars, as amended, are all of the contract purchasers that Robert H. Anthony has claimed, or now claims to have contracts with, that he has turned over to the plaintiff, Samuel P. Johnston, under the provisions of and terms of such four contracts.

It is further stipulated and agreed that this stipulation shall be received in evidence upon the further hearing of this cause, in lieu of any further oral, written or documentary evidence, which the plaintiff might or could introduce upon the hearing, with such probative force and in lieu of any testimony or evidence, either oral, written or documentary, which the plaintiff might or could introduce upon the hearing; but the defendant Robert H. Anthony shall not be barred from introducing or giving any further evidence either oral, written or documentary in support and under the issues joined on his pleas or set-off now on file.

Samuel P. Johnston, Plaintiff
Robert H. Anthony, Defendant

Approved:

O. J. C. Wray,

Attorney for Samuel P. Johnston, Plaintiff

Joseph E. Winterbotham,

Attorney for Robert H. Anthony, Defendant."

The four contracts heretofore set forth were also received in evidence.

Plaintiff testified that the individual entries in his books and other records as to the advancements made to defendant under the four contracts, totaling \$35,348.72, did not indicate specifically whether they were made for advertising, signs, transportation, parties, printing, office expenses, personal expenses, defendant's personal drawing account or sub-salesmen's drawing accounts.

Defendant produced nine hundred and forty documents, which he advised the trial court were receipts and his cancelled checks showing the purposes for which the money advanced to him by plaintiff was expended and would account for all of the funds so advanced.

While the documents were neither offered by defendant nor received

in evidence, plaintiff stipulated that the nine hundred and forty documents might be incorporated in "any bill of exceptions," without the necessity of tendering them and having them received as evidence in the trial court. These documents are not included in the bill of exceptions filed in this court.

Defendant testified that when he had expended the \$5,000 which plaintiff agreed to advance to him for the purposes enumerated in the second (1928) contract, and which was to be charged against his commission account, plaintiff said that "he wanted me to go over and continue developing and selling the property and that he would advance further sums of money for that purpose." Defendant testified to the same effect as to the third (1929) contract, under the terms of which plaintiff was to advance \$3,000 for the purposes therein set forth, which amount was to be charged against defendant's commission account.

Defendant contends that the advancements made by plaintiff to him from August 17, 1927, when the first contract was entered into and the first money advanced, to August 1, 1930, the date of the last advancement, cannot, under the evidence presented in this cause or under any reasonable construction of the four contracts, be legally charged against his earned commissions, except those that he specifically agreed to be charged with, i.e., \$2,000 under the first contract, \$5,000 under the second contract, \$3,000 under the third contract, and \$600 which he received under the fourth contract, particularly in view of the fact that plaintiff entered into a supplementary agreement with him to make the advancements on his own account and defendant agreed to disburse the funds so advanced in excess of the above amounts for the development and sale of plaintiff's property at his request.

Plaintiff's theory is that under the terms of the four contracts, \$35,348.72, the entire amount advanced by plaintiff to defendant, is chargeable against defendant's total earned commissions amounting

in witness, plaintiff exhibited some of the same documents and things
the same might be incorporated in "any bill or assignment," without
the necessity of further action and having them received as evidence
in the trial court. These documents are now included in the bill
of exception filed in this court.

Defendant is willing to pay the sum of \$10,000
which plaintiff agreed to advance to him for the purpose of making
in the second (1930) contract, and which was to be charged against
his commission account, plaintiff said that he wanted to do so
and continue a valuable and profitable property and that he could
advance further sums of money for that purpose. Defendant said
that to the same effect as to the first (1925) contract, which the
terms of which plaintiff was to advance \$5,000 for the purpose
therein set forth, which amount was to be charged against plaintiff's
commission account.

Defendant testifies that the advance was made by plaintiff to
him from August 14, 1917, when the first contract was entered into and
the first money advanced, to about 1, 1920, the date of the last
advance, when the advance presented in his name or
under any reasonable consideration of the four contracts, he legally
charged against his commission account, except when he specifically
agreed to be charged with it. i. e., \$5,000 under the first contract, \$5,000
under the second contract, \$5,000 under the third contract, and \$500
which he received under the fourth contract, particularly in view of
the fact that plaintiff entered into a supplementary agreement with him
to make the advance on his own account and defendant agreed to
disburse the funds so advanced in view of the above amounts for the
development and sale of plaintiff's property as his interest.
Plaintiff's theory is that under the terms of the four con-
tracts, \$5,000.00, the entire amount advanced by plaintiff to defendant,
is chargeable against defendant's total earned commission amounting

to \$32,254.59, and that inasmuch as defendant has already received in payment of said commissions \$15,281.00, collected by him as down payments on the sale of lots, he is indebted to plaintiff for the difference between \$35,348.72, the amount advanced, plus \$15,281.00 collected by defendant as down payments on lots sold by him and defendant's \$32,254.59 earned commissions, or \$18,375.13, for which the trial court entered judgment.

Other points are urged, but in our opinion the determination of this appeal rests exclusively on the question as to whether, under the law and the evidence, defendant is chargeable with any advancements made by plaintiff over and above the amounts he agreed to be charged with in each contract.

An entirely different question would be presented for our determination if defendant, out of collections made by him on the lots, expended for advertising, signs, parties, etc., without plaintiff's knowledge or consent, amounts in excess of the advancements plaintiff agreed to make under the terms of the four contracts.

It is undisputed that advancements aggregating \$24,748.72, for which plaintiff now seeks to hold defendant liable, were made by plaintiff personally in amounts ranging from \$100 to \$1,500 and with full knowledge that such advancements were in excess of the \$2,000, \$5,000, \$3,000 and \$600, which he agreed to advance under the four respective contracts and which defendant agreed ^{were} to be charged against his earned commissions. Plaintiff offered no explanation as to why he made such excessive advancements and does not even intimate in his testimony that he discussed with or sought from defendant any other or further agreement to charge him with the additional advancements. He must have known when he had reached the limit of the advancements provided for in each contract, for it was he who personally made out the checks for same and entered them in his books.

The decision of this cause by this court is not only not

to \$22,551.00, and that in 1950 the defendant had already received in payment of said commissions \$1,000.00, collected by him on the payment on the basis of loss, he is indebted to plaintiff for the difference between \$21,551.00, the amount advanced, plus \$10,000.00 collected by defendant as down payment on loss sold by him and defendant's \$32,551.00 earned commissions, or \$10,551.00, for which the court is entering judgment.

Other points are urged, but in our opinion the determination of this appeal rests exclusively on the question as to whether under the law and the evidence, defendant is chargeable with the advancement made by plaintiff over and above the amount he agreed to be charged with in each contract.

An entirely different question would be presented for our determination if defendant, out of collusion made by him on the basis, expended for advertising, agent, parties, etc., without plaintiff's knowledge or consent, amounts in excess of the advance. The plaintiff agreed to bear under the terms of the four contracts.

It is undisputed that defendant advanced approximately \$2,750.00 for which plaintiff now seeks to hold defendant liable, and that plaintiff personally in advance ranging from \$1,000 and with full knowledge that each advancement was in excess of the \$2,000, \$3,000, \$3,000 and \$200, which he agreed to advance under the four

renewable contracts and which defendant agreed to be charged against his earned commissions. Plaintiff offered no explanation as to why he made such excessive advancements and does not even intimate in his testimony that he is charged with or could have been in any other or further agreement to charge him with the additional advancements. He has not shown when he had reached the limit of the advancements provided for in each contract, for if he had he would have been and the checks for same are entered into his books.

The decision of this court by this court is not only not

free from difficulty, but in our opinion it is impossible to determine the rights of the parties on the record presented.

It will be noted that it is expressly provided in the second contract that "in the event that Anthony's commission account at the termination of this contract shall fall short of the advances, Anthony at his option shall give Johnston cash or a note (for a reasonable length of time) to balance his account. Any commission credits accruing thereafter shall be paid in cash to Anthony if he shall have balanced his account with a cash payment, or shall be credited on his note if he gives a note for settlement." The same provision is contained in the third contract and it is reasonable to infer that at the expiration date of both contracts an accounting was to be had between the parties to determine how much, if any, plaintiff's advancements as agreed upon when the contracts were executed, exceeded defendant's earned commissions.

The record in this case is silent as to any accounting or adjustment of the affairs of the parties at the termination of the third contract. As to the second contract, plaintiff presented in evidence the following instrument:

"Chicago, Illinois,
December 31, 1928.

This promissory note is given by me to S. P. Johnston, to cover an advance of seventy-nine hundred twelve and 88/100 Dollars (\$7912.88). I, therefore, agree to pay to the order of S. P. Johnston, at his office on December 31, 1931, the principal sum of Seventy-nine hundred twelve and 88/100 Dollars (\$7912.88), with the privilege of paying any part of or the whole said sum at any time before due date.

It is expressly understood, that the principal sum herein above mentioned is to be diminished by credits due to me under the terms of a contract entered into by and between S. P. Johnston and myself under date of March first, 1928.

It is further understood that the principal sum herein above mentioned is to be further diminished by any credit balance (when same became due to me) which I may have in my commission account up to and including December 31st, 1931, in accordance with the terms of a contract made by and entered into between S. P. Johnston and myself under date of January first, 1929.

I further agree to deliver a life insurance policy for the sum of eight thousand dollars (\$8,000.00) payable to S. P. Johnston until said note is paid.

Robert H. Anthony."

from the testimony, but in our opinion it is impossible to determine the value of the policy on the basis of the testimony.

It will be noted that it is expressly provided in the contract that in the event that the insured should die prior to the termination of this policy it shall be paid to the beneficiary, and that in his option shall give the beneficiary a cash loan on the basis of the value of the policy.

In view of the fact that the insured has died prior to the termination of this policy it is necessary to determine the value of the policy at the time of his death. The value of the policy is determined by the amount of the cash loan which would be payable to the beneficiary in the event of the insured's death.

The value of the policy is determined by the amount of the cash loan which would be payable to the beneficiary in the event of the insured's death. The value of the policy is determined by the amount of the cash loan which would be payable to the beneficiary in the event of the insured's death.

The record in this case is clear as to the value of the policy at the time of the insured's death. The value of the policy is determined by the amount of the cash loan which would be payable to the beneficiary in the event of the insured's death.

The value of the policy is determined by the amount of the cash loan which would be payable to the beneficiary in the event of the insured's death. The value of the policy is determined by the amount of the cash loan which would be payable to the beneficiary in the event of the insured's death.

It is expressly understood that the beneficiary shall receive the cash loan which would be payable to the beneficiary in the event of the insured's death. The value of the policy is determined by the amount of the cash loan which would be payable to the beneficiary in the event of the insured's death.

It is further understood that the beneficiary shall receive the cash loan which would be payable to the beneficiary in the event of the insured's death. The value of the policy is determined by the amount of the cash loan which would be payable to the beneficiary in the event of the insured's death.

I further agree to deliver a life insurance policy for the sum of \$100,000.00 payable to the beneficiary in the event of the insured's death. The value of the policy is determined by the amount of the cash loan which would be payable to the beneficiary in the event of the insured's death.

This instrument executed on the day the second contract terminated specified that the amount advanced by plaintiff to defendant, ostensibly under the second contract and for which defendant's note was given to plaintiff, apparently to balance his account under the terms of that contract, was \$7,912.80. This figure was certainly not arrived at by the parties as a result of an accounting between them, because under the terms of the second contract even though defendant were held to be obligated to plaintiff for \$15,369.22, the total advancements made by plaintiff during the period covered by this contract, he had a credit of \$12,302.34 on his earned commissions account less \$1,175 received as down payments on lots sold by him, which left defendant a net credit of \$11,127.34. The difference between this net credit and \$15,369.22, the total advancements under this contract, was not \$7,912.88 as specified in the note, but \$4,242.22 as shown by plaintiff's own audit of the transactions covered by all of the contracts, which was filed by him as an amended bill of particulars and also admitted in evidence.

The parties and their attorneys entered into a stipulation which clarified and settled fourteen pages of items contained in plaintiff's auditor's report and permitted the presentation in evidence of agreed figures as to the total earned commissions of defendant, the down payments on lots received by him and the advancements made by plaintiff to defendant for the entire period covered by the four contracts, but the stipulation by its terms foreclosed plaintiff from explaining why or under what circumstances the advancements were made by him to defendant in excess of those enumerated in the contracts.

In our opinion no construction of the contracts in evidence is necessary. The question to be determined is not so much the interpretation of these contracts, but rather what, if any,

This instrument, executed on the day the second contract terminated specified that the second contract by Plaintiff to defendant, defendant, under the terms of that contract, and for which defendant's note was given as collateral, was to be paid to Plaintiff's account under the terms of that contract, and \$1,000.00. This figure was certainly not arrived at by the parties as a result of an accounting between them, because under the terms of the contract contract even though defendant was to be obligated to Plaintiff bill for \$15,366.93, the total advancement made by Plaintiff during the period covered by this contract, he had a credit of \$15,366.93 on his earned commission account less \$1,115.00 as fees for notes on file with him, which is a balance of \$14,251.93. The difference between this and the \$15,366.93, the total advancement under this contract, was \$1,115.00 as specified in the note, and \$1,115.00 as shown by Plaintiff's own audit of the transactions covered by all of the contracts, which was filed by him as an exhibit of his account and also admitted in evidence.

The parties and their attorneys entered into a stipulation which admitted and settled certain facts of their contract in Plaintiff's notice to pay, and furnished the presentation in evidence of these facts as to the total amount of advancement, the fees payable on the contract, and the advancement made by Plaintiff to defendant for the entire period covered by the contract, but the admission by the parties to submit Plaintiff's figures regarding why he made these calculations and assumptions were made by him in evidence in favor of those submitted in the contract.

In our opinion an admission of the contract in evidence is necessary. The question to be determined is not so much the interpretation of these contracts, but rather what, if any,

supplementary or additional contracts/^{or agreements}were made by the parties to cover the excessive advancements. By their terms the rights and liabilities of the parties are plainly and definitely fixed and no question arises as to the nonperformance or the failure of either party to perform his obligations under these contracts. It does not appear that either party seeks to evade this responsibility under the contracts, but the controversy evolves around the excessive advancements which were not provided for in the contracts.

Although defendant testified in effect that plaintiff, when apprised by him that the advancements specified in the contracts and which defendant agreed to be charged with had been expended, authorized defendant to continue his campaign of lot selling and assured him that he would continue making advancements to defendant on his own account for the purpose of developing and selling the lots, the record discloses no denial of this testimony by plaintiff. Even though this testimony was false plaintiff could not deny it because his stipulation heretofore referred to precluded him from so doing. However, when plaintiff testified before the stipulation was agreed upon and presented in evidence and when he was free to do so, he offered no explanation as to why he continued making advancements to defendant when he knew that such advancements were greatly in excess of the amounts stipulated in the respective contracts. Neither did he relate nor offer to relate the circumstances under which he made the excessive advancements for which he now seeks to hold defendant liable.

Assuming that defendant was not liable for the excessive advancements properly disbursed by him, his evidence as to his disbursement of the money advanced was too unsatisfactory and indefinite for this court to determine whether such disbursements were made for purposes contemplated by the parties.

After a careful study of the entire record, we have

reached the conclusion that the evidence in its present shape is not sufficient to enable us to determine the rights of the parties. It is evident that neither side presented satisfactory evidence in support of his case, and we are convinced that justice demands a retrial of this cause.

For the reasons indicated herein the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Seanlan, J., concur.

reached the conclusion that the evidence in this case is not sufficient to enable us to determine the guilt of the prisoner. It is evident that neither side presented sufficient evidence in support of his case, and we are therefore unable to reach a verdict of this case.

For the reasons indicated herein the judgment of the majority court is reversed and the case remanded.

GRADY, J., and GARNETT, J., concur.

37138

ABE ELLIS and HAROLD ELLIS,
doing business as HAMLIN
PARKWAY GARAGE, for the use
of HENRY PERLMAN,
Appellant,

v.

LIBERTY TRUST & SAVINGS BANK,
a corporation, garnishee,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

277 I.A. 626²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

A trial before the court without a jury in a garnishment action brought by Abe Ellis and Harold Ellis, doing business as the Hamlin Parkway Garage, for the use of Henry Perlman, against the Liberty Trust & Savings Bank, a corporation, garnishee, resulted in a finding in favor of the garnishee and the entry of a judgment against the beneficial plaintiff for costs. This appeal followed.

This cause was heretofore before this court for review, and, in our unpublished opinion, No. 36174, filed April 11, 1933, was reversed and remanded, principally because the evidence was confusing and indefinite and because, in our opinion, the issues could not be fairly and properly determined on the record then presented to this court.

December 31, 1931, Henry Perlman recovered a judgment by confession for \$815 in the Municipal court against Abe Ellis and Harold Ellis, doing business as the Hamlin Parkway Garage. On the same day after an execution had been returned "no property found" a garnishment affidavit was filed and garnishee summons issued against the Liberty Trust & Savings Bank as garnishee.

The writ was served on the garnishee December 31, 1931, and directed garnishee to answer as to rights, credits, choses in action, effects, estates, property or money in its hands belonging to Abe Ellis and Harold Ellis, doing business as the Hamlin Parkway Garage.

February 1, 1932, the bank filed its answer asserting that at the time of the service of the writ and at all times since and up to and including the date of the answer it was indebted to the principal defendant in the amount of \$15.41, which defendant had on deposit with the garnishee bank, and that it had no moneys, etc., owned by or due to the defendant except the \$15.41 in its possession at the time of the service of the writ or at any time since then up to the date it filed its answer. The cause proceeded to trial on beneficial plaintiff's contest of the bank's answer.

It is undisputed that the garnishee bank did not have any money in its possession in any account in the name of Abe Ellis, Harold Ellis, Hamlin Parkway Garage, or Abe Ellis and Harold Ellis, doing business as Hamlin Parkway Garage, at the time of the service of the writ or at any time up to the filing of the answer.

At the time this action was instituted there was in force and effect the following rule of the Municipal court:

"In all garnishment cases the copy of the writ to be left with the garnishee shall bear an endorsement of the business of the principal defendant with his (or its) business and residence address so far as known, and if based on a prior judgment, also the date and amount of the judgment and the costs to date of writ."

The summons served on the garnishee and admitted in evidence disclosed plaintiff's utter failure to comply with this rule. Neither the business of the principal defendants, their business and residence addresses nor the date and amount of the prior judgment and costs were indorsed on the writ.

Instead of questioning the writ for failure to conform to the rule as stated, Mr. Miller, who was an attorney and an officer

The suit was served on the defendant December 11, 1931, and directed
plaintiff to answer as to whether or not the money was in fact
deposited, property or money in the hands of the defendant in the name of the
defendant.

Heretofore, being business as the defendant's attorney.

Wherefore I, the defendant, the bank filed its answer asserting that

at the time of the service of the writ and at all times since and up

to and including the date of the writ it was indebted to the

plaintiff defendant in the amount of \$10,000.00 which defendant had on

deposit with the Commercial Bank, and that it has no money, etc.,

owned by or due to the defendant except the \$10,000 in the possession

at the time of the service of the writ or at any time since then up

to the date it filed its answer. The answer proceeds to set out on

defendant's pleading a recital of the bank's answer.

It is asserted that the Commercial Bank did not have any

money in its possession in any account in the name of the bank.

Heretofore, being business as the defendant's attorney, of the bank and Heretofore, being

being business as the defendant's attorney, of the bank and Heretofore, being

of the bank and Heretofore, being business as the defendant's attorney, of the bank

at the time this action was instituted there was in force

and effect the following writ of the plaintiff's court:

"In all proceedings under the writ of the writ to be held
with the Commercial Bank as defendant of the business of the
plaintiff defendant with the (a) Commercial Bank and defendant's attorney
as for as known, and it is based on a prior judgment, also the date and
amount of the judgment and the date of the writ."

The answer served on the defendant and returned in this

action is filed with the court to comply with the rule.

Whether the business of the plaintiff defendant, their business and

whether or not the bank and amount of the prior judgment

and other facts entered on the writ.

Instead of questioning the writ for failure to comply to

the rule as stated, Mr. Miller, who was an attorney and an officer

of the bank, testified in garnishee's behalf that along with his other duties he supervised all garnishment proceedings against the bank; that when the writ was served on the bank he read it and it named Abe Ellis, Harold Ellis or the Hamlin Parkway Garage; that he found no account in any of these names; that December 31, 1931, he telephoned the office of the attorney, who was the beneficial plaintiff, and was told that he was out of town; that he called Mr. Perlman several times later upon his return to Chicago and told him that, if the bank had any such account and proper information was furnished, he would be glad to run it down; that he could not find any such account, but was willing to render any assistance possible; that he persisted in asking Perlman for further information to assist him in looking up possible accounts of the principal defendants; that finally, on January 9, 1933, when Perlman gave him the address of Harold Ellis as 3932 Van Buren street, he ascertained for the first time that a checking account in the bank under the name of H. H. Ellis was the account of Harold Ellis, one of the principal defendants; that he immediately ordered that no withdrawals be permitted from this account, but that earlier on the same day, before the identity of the account had been established and discovered, Harold Ellis or H. H. Ellis had drawn \$1,278.23 from the account.

The plaintiff first contends that the garnishee was negligent and acted in disregard of the rights of the plaintiff in failing to locate and discover the account of H. H. Ellis as the money and property of Harold Ellis, the judgment debtor.

It is sufficient answer to this contention to state that the beneficial plaintiff failed to prove any negligence on the part of the garnishee in failing to locate and discover the account of H. H. Ellis as the money and property of Harold Ellis, one of the judgment debtors. As we view the matter the failure of the

of the bank, recalled an advertisement which had appeared in the
other cities he had visited all government proceedings and that the
bank had when the will was served on the bank he had it and it
named the wife, Harold Ellis as the holder of the account and that
he found no account in any of those names; that on October 27, 1931,
he telephoned the office of the attorney, who was the principal
plaintiff, and was told that he was out of town; that he called
Mr. Pearson several times later upon his return to Chicago and told
him that if the bank had any such account and proper information
was furnished, he would be glad to let it know; that he could not
find any such account, but was willing to render any assistance
possible; that he persisted in asking Pearson for further infor-
mation so as to assist him in looking up possible accounts at the principal
testaments; that finally, on January 7, 1932, when Pearson gave him
the address of Harold Ellis as 502 1/2 Van Buren Street, he investigated
for the first time that a checking account in the bank under the
name of H. H. Ellis was the account of Harold Ellis, one of the
principal testaments; that he immediately obtained that no withdrawal
he permitted from this account, but that earlier on the same day,
before the identity of the account had been established and dis-
covered, Harold Ellis or H. H. Ellis had drawn \$1,475.00 from the
account.

The plaintiff first contends that the defendant was
negligent and acted in disregard of the rights of the plaintiff in
failing to locate and discover the account of H. H. Ellis at the
money and property of Harold Ellis, the defendant's father.
It is submitted in answer to this contention to state that
the defendant's failure to locate and discover the account of
H. H. Ellis as the money and property of Harold Ellis, one of the
testaments before, as he was the father of the father of the

garnishee to locate and discover the account was due rather to Perlman's negligence in failing to comply with the rule of the Municipal court, quoted herein, and in failing further to supply the bank with such information as would enable it to identify the account.

We adopt as applicable to the issues presented for our determination on this appeal the following language from our former opinion in this cause, heretofore referred to:

"In passing on a case where a judgment debtor's name was Joe Hantman and garnishee bank permitted payment to a creditor whose name was Joe Handman, this court held in Hantman v. The West Side Trust & Savings Bank, 249 Ill. App. 372, 379:

"After a careful consideration of many of the authorities bearing on the subject, we have reached the conclusion that the following is a correct statement of the law applicable to the present contention: A writ or summons in garnishment must contain an accurate description as to the name of the principal defendant or person to whom the garnishee is indebted but "the garnishee becomes liable to hold the property subject to the process where he has actual knowledge of the identity of the principal defendant though the latter's name is not correctly given or has reason to suppose the proceedings are intended to be against his creditor." (28 C. J. 220, 221.)"

"And in the same opinion the court continuing on page 381 held:

"In the instant case it is not disputed that the writ did not designate with accuracy and clearness the person to whom the garnishee was indebted, and the plaintiff had the burden of proving that the garnishee had actual knowledge of the identity of the principal defendant, or had reason to suppose that the garnishee proceedings were intended to be against its creditor. In our judgment, plaintiff had failed in this regard. The burden was upon the beneficial plaintiff to show that the garnishee acted in bad faith (Wilhelmi v. Haffner, 52 Ill. 222; Hennessey Bros. & Co. v. St. Mary's Academy, 171 Ill. App. 470, 472), and there is not a scintilla of evidence in the case tending to show that the defendant bank so acted, nor is there any proof that the garnishee had actual knowledge of the identity of the principal defendant, nor are there sufficient facts and circumstances to warrant a finding that the defendant bank had reason to suppose that the garnishee proceedings were intended to be against Joe Handman."

In our former opinion we go on to state:

"So in this case where the person to whom the garnishee was indebted was not designated with accuracy and clearness, where the judgment debtor's name was Harold Ellis, and the garnishee bank's creditor was H. H. Ellis, the plaintiff had the burden of proving that the garnishee had actual knowledge of the identity of the principal defendant or had reason to suppose that the garnishee proceedings were intended to be against its creditor, H. H. Ellis. The burden was on the plaintiff to show that the garnishee acted in bad faith. This the plaintiff failed to do. There is no evidence in the case tending to show that the bank so acted. The evidence in the record is to the effect that the garnishee bank, unable to

the same with each instance as well as it is usually the

The above information was obtained from the records of the Federal Bureau of Investigation, Department of Justice, Washington, D.C., and is being furnished to you for your information.

1. The first of these is the fact that the Government has not been able to secure the necessary cooperation of the people in the various measures which it has taken to improve the economic situation of the country. This is due to a number of causes, including the lack of a strong sense of national unity, the prevalence of corruption, and the failure of the Government to carry out its policies in a consistent and effective manner.

1. The first of these is the fact that the Government has failed to establish that the defendant was in the United States at the time of the crime. The Government has failed to establish that the defendant was in the United States at the time of the crime. The Government has failed to establish that the defendant was in the United States at the time of the crime.

[illegible][illegible]

find accounts of the principal defendants, as named in the writ, used all reasonable diligence in endeavoring to locate the account the plaintiff sought to reach.

"The plaintiff further contends that regardless of the merits of its first contention the judgment of the Municipal court should be reversed and judgment entered here for \$615, the full amount of its original judgment, on the grounds that even though garnishee could not and did not locate the account in question upon the service of the writ or for several days thereafter, it did finally locate and discover an account of the principal defendant, Harold Ellis, under the name and style of H. H. Ellis, and that at the time of such discovery there was more than sufficient money in the account to cover the original judgment. The plaintiff is correct in this contention if it was shown by the evidence that at the time of the discovery of the account there were funds in the hands of the garnishee belonging to the judgment creditor."

To support this contention we have to look solely to the evidence of Mr. Miller, which absolutely refutes the purported facts upon which the contention is based. Mr. Miller testified positively that the money Perlman sought to reach by his garnishee proceeding had been withdrawn from the bank by Harold Ellis or H. H. Ellis prior to the receipt of the information from Perlman that enabled the bank to identify and discover the account in question.

For the reasons indicated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

37254

FRANK LESTER,
Defendant in Error,

v.

MICHAEL LEVIN and ROBERT MORS,
sued as John Doe,
Plaintiffs in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

277 I.A. 626³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

April 2, 1932, Frank Lester, plaintiff, filed an affidavit for replevin in the Municipal court setting forth that he was the owner and entitled to the possession of a certain Cadillac automobile of the value of \$500, and that Michael Levin, John Doe and Mary Roe, defendants, wrongfully took and detained such automobile.

The replevin writ returnable April 11, 1932, was served upon Robert Mors, sued as John Doe, in whose possession the automobile was found. He filed his appearance April 7, 1932.

April 11, 1932, Michael Levin, who had been served with summons, was defaulted and the court found the right to the possession of the automobile in plaintiff and entered judgment on such finding, without regard to the appearance of defendant Robert Mors then on file.

April 14, 1932, the judgment of April 11, 1932, was vacated on motion of Robert Mors and on May 25, 1932, an order was entered "finding the property in the plaintiff, but held by the defendant for the payment of \$40.95 in five days," upon which judgment was entered "on finding in alternative that

THANK YOU,
Defendant in error,

Y.

MICHAEL LEVIN and ROBERT HORN,
Plaintiffs in error,
vs.
JOHN DOE,
Defendant in error.

COURT OF RECORDS
JANUARY 10, 1933

277 I.A. 320

MR. JUSTICE SULLIVAN delivered the opinion of the court.

April 8, 1932, Frank Jackson, Plaintiff, filed an affidavit for replevin in the Municipal Court setting forth that he was the owner and entitled to the possession of a certain Cadillac automobile of the value of \$300, and that Michael Levin, John Doe and Mary Lee, Defendants, wrongfully took and detained such automobile.

The replevin was returnable April 11, 1932, was served upon Robert Horn, and as John Doe, in whose possession the automobile was found. He filed his appearance April 7, 1932.

April 11, 1932, Michael Levin, who had been served with summons, was defaulted and the court found the right to the possession of the automobile in Plaintiff and entered judgment on such finding, without regard to the appearance of defendant Robert Horn then on file.

April 14, 1932, the judgment of April 11, 1932, was vacated on motion of Robert Horn and on May 22, 1932, an order was entered "finding the property in the Plaintiff, and held by the defendant for the payment of \$40.75 in five days," upon which judgment was entered "on finding in alternative that

plaintiff pay defendant Robert Mors \$40.95 in five days or retorno habendo to issue versus plaintiff as to property replevied and costs versus plaintiff."

December 23, 1932, plaintiff's motion to vacate the order of April 14, 1932, and the judgment of May 23, 1932, was sustained by the trial court. It is this order which Robert G. Mors, sued as John Doe, seeks to reverse. No appearance or brief has been filed in this court by plaintiff.

Mors contends that the trial court had no jurisdiction to enter the order of December 23, 1932, because more than thirty days had elapsed after the entry of the judgment and plaintiff did not make a sufficient showing under section 21 of the Municipal Court Act upon which to base the order of December 23, 1932.

Section 21 of the Municipal court Act provides the following methods of vacating or modifying a judgment of that court when it is sought to do so more than thirty days after the entry of such judgment: (1) By appeal or writ of error; (2) by a bill in equity; (3) by a petition to the Municipal court in the nature of a bill in equity; (4) by motion in the nature of a writ of error coram nobis; and (5) in the manner provided by law for similar cases in the Circuit court.

The record filed in this court is certified to be the complete common law record in this cause. It does not include a bill of exceptions.

We are not advised by either the record or Mors' brief as to just what procedure was followed in the trial court upon which the judgment in this cause was vacated nor as to the nature of the petition or written motion, if any, upon which the court predicated its order to vacate the judgment. However, since the judgment entered May 23, 1932, was not vacated until December 23, 1932, it

plaintiff pay defendant Robert more \$40.00 in five days or return
pendente lite versus plaintiff as to property involved and costs
 versus plaintiff."

December 22, 1932, plaintiff's motion to vacate the order
 of April 14, 1932, and the judgment of May 23, 1932, was sustained by
 the trial court. It is this order which Robert G. Marx, sued as
 John Doe, seeks to reverse. No appearance or brief has been filed
 in this court by plaintiff.

Marx contends that the trial court had no jurisdiction
 to enter the order of December 22, 1932, because more than thirty
 days had elapsed since the entry of the judgment and plaintiff did
 not make a sufficient showing under section 21 of the Municipal
 Court Act upon which to base the order of December 22, 1932.

Section 21 of the Municipal Court Act provides the
 following methods of vacating or modifying a judgment of that court
 when it is sought to do so more than thirty days after the entry of
 such judgment: (1) by appeal or writ of error; (2) by a bill in
 equity; (3) by a petition to the Municipal Court in the nature of
 a bill in equity; (4) by motion in the nature of a writ of error
coram nobis; and (5) in the manner provided by law for similar
 cases in the Circuit Court.

The record filed in this court is certified to be the
 complete common law record in this cause. It does not include a
 bill of exceptions.

It is not advised by either the record or Marx' brief
 as to just what procedure was followed in the trial court upon which
 the judgment in this cause was vacated nor as to the nature of the
 petition or written motion, if any, upon which the court vacated
 its order to vacate the judgment. However, since the judgment
 entered May 23, 1932, was not vacated until December 22, 1932, it

is evident that plaintiff could only have proceeded with his motion to vacate the judgment and the order of April 14, 1932, vacating the original default judgment, under either the third or fourth methods heretofore indicated, inasmuch as more than thirty days had elapsed since the entry of the judgment and order. If he proceeded under the third method, it was incumbent upon him to file his petition in writing in the nature of a bill in equity, setting forth the grounds upon which he sought to vacate or modify the judgment and order. Such a petition filed by plaintiff in support of his motion to vacate the judgment and order would have been in the nature of a new proceeding, the petition being in the nature of a bill in equity which is a part of the common law record without a bill of exceptions. (Welley v. Klein, 257 Ill. App. 171.) No petition to vacate the judgment appearing in the common law record, we must conclude that no such petition was filed. It necessarily follows that the only legally effective method available to plaintiff under which he might proceed in the Municipal court to vacate the judgment and order was by a written motion in the nature of a writ of error coram nobis.

A motion under section 89 of the Practice Act is independent of the suit or proceeding in which the judgment sought to be corrected or vacated was rendered and must be in writing. Such a motion stands as a declaration in a new suit in which new issues are presented and upon which there must be a finding and judgment. (Central Bond Company v. Roesser, 323 Ill. 90.) If a motion under section 89 of the Practice Act was made, it was properly a part of the common law record, but no such motion is included in the complete / common law record filed in this court. We must conclude, therefore, that plaintiff did not proceed and that the court did not act under the fourth method prescribed.

It is evident that plaintiff could only have proceeded with his motion to vacate the judgment and the order of April 14, 1933, vacating the original default judgment, under either the third or fourth methods heretofore indicated, inasmuch as more than thirty days had elapsed since the entry of the judgment and order. If he proceeded under the third method, it was incumbent upon him to file his petition in writing in the nature of a bill in equity, setting forth the grounds upon which he sought to vacate or modify the judgment and order. Such a petition filed by plaintiff in support of his motion to vacate the judgment and order could have been in the nature of a new proceeding, the petition being in the nature of a bill in equity which is a part of the common law record without a bill of exceptions. (*Wiley v. Wiley*, 237 Ill. App. 171.) No petition to vacate the judgment appearing in the common law record, we must conclude that no such petition was filed. It necessarily follows that the only legally effective method available to plaintiff under which he might proceed in the Municipal Court to vacate the judgment and order was by a written motion in the nature of a writ of error coram nobis.

A motion under section 83 of the Practice of the Indiana Common Law Court, as amended, which the judgment sought to be corrected or vacated was returned and made be in writing. When a motion stands as a declaration in a new suit in which new issues are presented and upon which there must be a finding and judgment. (*Central Bond Company v. Bond*, 237 Ill. App. 171.) If a motion under section 83 of the Practice of the Court, it was properly a part of the common law record, but no such motion is indicated in the complete law record filed in this court. We must conclude, therefore, that plaintiff did not proceed and that the Court did not act under the fourth method heretofore indicated.

COMMON

We are impelled to the conclusion that the court in vacating the judgment and the order of April 14, 1932, acted solely on plaintiff's oral motion in violation of the express provisions of section 21 of the Municipal Court Act and contrary to numerous decisions of our Supreme Court construing this section.

No default judgment should have been entered April 11, 1932, because Mors' appearance was on file, same having been filed April 7, 1932, and the rules of the Municipal court provide that in this class of cases, where an appearance of a defendant is on file, the cause is not subject to trial on its return day, except upon agreement of the parties. The default judgment was properly vacated on Mors' motion made within thirty days of its entry. The effect of the order appealed from, if permitted to stand, would have been to reinstate and validate the default judgment which was erroneously entered.

For the reasons indicated herein the order of the Municipal court of December 23, 1932, should be and it is reversed.

REVERSED.

Gridley, P. J., and Seanlan, J., concur.

It is implied by the evidence that the court in
reaching its judgment and the order of July 14, 1935, based
solely on Plaintiff's oral motion in violation of the express
provisions of section 23 of the Municipal Court Act and contrary
to numerous decisions of our Supreme Court respecting this section.
No oral motion should have been entered until 11,
1935, because here, appearances are on file, some having been filed
July 7, 1935, and the rules of the Municipal Court provide that
in this class of cases, where an appearance is a requirement as on
file, the case is not subject to trial on the same day, except
when payment of the parties. The Municipal Court judgment was
reversed on both motions were made subject to the order.
The effect of the order appears to be, it provides for trial, which
have been to require and violate the Municipal Court judgment which was
expressly entered.

For the reasons in fact herein the order of the
Municipal Court of 1935, 1936, should be and is reversed.
Dated this 14th day of July, 1936.

Justice, J. J. and Justice, J. J. Justice.

37292

WHITE EAGLE BUILDING & LOAN
ASSOCIATION, a corporation,
Defendant in Error,

v.

ESTELLE KWIATKOWSKI et al.,
Plaintiffs in Error.

887
ERROR TO CIRCUIT COURT,

COOK COUNTY.

277 I.A. 626⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This writ of error seeks to reverse a decree of foreclosure entered by the Circuit court against Estelle Kwiatkowski, administratrix of the estate of Katarzyna Kwiatkowski and other defendants, who were the nine children of Jan and Katarzyna Kwiatkowski, the seven youngest of whom were minors for whom a guardian ad litem had been appointed.

The White Eagle Building & Loan Association (hereinafter referred to as the association), filed its second amended bill of complaint to foreclose the premises in question March 28, 1932, in which it alleged that it was a building and loan association duly incorporated under the laws of the state of Illinois; that September 18, 1924, Jan and Katarzyna Kwiatkowski were the owners in fee simple of certain real estate which was subject to the lien of a trust deed executed to secure the payment of an indebtedness of \$5,000 and interest thereon to the Peoples Stock Yards State Bank, as trustee; that September 18, 1924, Jan Kwiatkowski and Katarzyna Kwiatkowski, his wife, applied for membership in the association and thereupon became members thereof and subscribed for and became the owners of eighty shares of stock issued by it at \$100 a share; that on the same day they applied for a loan subject to the provisions of the charter and by-laws of the association

2172

WASH DC (100) JUNE 1964
 (100) JUNE 1964
 TO THE DIRECTOR

43

1. In the Department of Education
2. In the Department of Health

THE UNIVERSITY OF CHICAGO PRESS

100-443887-100

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

100-443887-100

RECEIVED 12-14-70 FROM THE DIRECTOR OF THE FBI

SECRET

...to be ...

2025 RELEASE UNDER E.O. 14176

NOTED TO BE OF INTEREST TO THE BUREAU OF THE ARMY

complaint to the... in... 1989

in 1960, and in 1961, the number of cases was 1,000 and 1,200 respectively.

My investigation shows the state of Missouri has

Approved: 12, 1924, 2:00 PM. Secretary, U.S. Fish and Wildlife Service.

10-11-68

over 3000 ft. to 3700 ft., the canyon or gulches had about a 10

THE UNIVERSITY OF CHICAGO PRESS

1947-1948

THE UNIVERSITY OF CHICAGO LIBRARY

THE UNIVERSITY OF CHICAGO

[illegible]

100% of the respondents reported that they were not aware of the program.

... ..

for the purpose of discharging the lien of the trust deed then existing against said real estate; that their application for the loan was accepted and they executed a certain agreement which acknowledged their indebtedness to the association of \$8,000; that to secure the indebtedness the Kwiatkowskis executed and delivered a mortgage conveying the real estate in question to the association, which mortgage was duly recorded; that the association is the legal holder and owner of the indebtedness; that pursuant to the execution and delivery of the mortgage to it the association's check for \$8,000 was drawn and delivered to Jan Kwiatkowski, which check was thereafter paid in due course; that the mortgagors have defaulted in the payment of the weekly installments due under their agreement, as well as in the payment of taxes; that the association was compelled to pay the taxes; that the Kwiatkowskis failed and neglected to pay and discharge the lien of the prior trust deed upon said real estate out of the proceeds of the check for \$8,000; that complainant, in order to protect the lien of its mortgage, was compelled to and did on February 28, 1927, pay the notes secured by the prior trust deed in order to have same released; that, by reason of the default of the mortgagors, a resolution was adopted by the association directing the foreclosure of the mortgage in accordance with its terms; that Jan Kwiatkowski died in December, 1925, and Katarzyna Kwiatkowski in March, 1926; that defendants are indebted to plaintiff in the sum of \$18,000; and that the premises are improved with a two story building. Complainant prayed for the foreclosure of the mortgage, an accounting, a deficiency decree and the appointment of a receiver, and a guardian ad litem for the minor children.

Estelle Kwiatkowski, individually and as administratrix of the estate of her mother, Katarzyna Kwiatkowski, filed an

for the purpose of effecting the lien of the first trust deed
 existing against said real estate; that said application for the
 loan was accepted and they executed a certain agreement which
 constituted their indebtedness to the association of \$5,000;
 that to secure the indebtedness the Katschowski executed and
 delivered a mortgage conveying the real estate in question to the
 association, which mortgage was duly recorded; that the association
 is the lawful holder and owner of the indebtedness; that pursuant
 to the execution and delivery of the mortgage to the association's
 check for \$5,000 was given and delivered to the Katschowski, which
 check was thereafter paid in full; that the mortgagee have
 retained in the payment of the weekly installments due under their
 agreement, as well as in the payment of taxes; that the association
 was compelled to pay the taxes that the Katschowski failed and
 neglected to pay and discharge the lien of the first trust deed
 upon said real estate out of the proceeds of the check for \$5,000;
 that complainant, in order to protect the lien of its mortgage,
 was compelled to act and did on February 22, 1927, pay the notes
 secured by the first trust deed in order to have same released;
 that, by reason of the failure of the mortgagee, a resolution was
 adopted by the association directing the foreclosure of the mortgage
 in accordance with the terms that the Katschowski then in default,
 1927, and Katschowski Katschowski in March, 1927; that complainant was
 indebted to plaintiff in the sum of \$10,000; and that the premises
 are conveyed with a first mortgage. Complainant prayed for
 the foreclosure of the mortgage, an accounting, a deficiency decree
 and the appointment of a receiver, and a cancellation of the lien for the
 minor children.

Katschowski Katschowski, individually and as administratrix
 of the estate of her mother, Katschowski Katschowski, filed an

answer alleging that she had no knowledge of the contract or mortgage referred to in complainant's bill. Her answer denied that complainant had ever paid Jan Kwiatkowski or his wife \$8,000 or any part thereof, and alleged upon information and belief that there was a prior incumbrance upon the premises; and that the proceeds of the loan were not used for the purpose of paying and discharging such prior incumbrance, but were wrongfully misappropriated by the agents and servants of plaintiff. The answer contained a general denial of the allegations of complainant's bill and called for strict proof thereof.

An answer was filed on behalf of the minor defendants by their guardian ad litem, which neither admitted nor denied the allegations of the bill, but demanded strict proof thereof.

The cause was referred to a master in chancery, who, after hearing the evidence, filed his report recommending that a decree of foreclosure be entered.

After overruling all exceptions to the master's report the chancellor adopted the recommendations contained therein, except as to the amount found to be due and owing to complainant. The decree entered by the chancellor found that September 18, 1924, Jan Kwiatkowski and his wife became indebted to complainant in the sum of \$8,000 for money loaned to them and executed the mortgage sought to be foreclosed herein; that the complainant was the legal owner and holder of said mortgage; that there was a default in the terms and conditions thereof; that, at the time the said loan was negotiated, there appeared of record against the premises a trust deed to the Peoples Stock Yards State Bank to secure an indebtedness of \$5,000; that a portion of the proceeds of the loan made by complainant was to be used by the Kwiatkowskis for the purpose of paying off the aforesaid trust deed then of record; that, upon the

answer alleging that she had no knowledge of the contents of
 mortgage referred to in complaint's bill. The answer denied
 that complaint had ever called on her or her wife
 \$5,000 or any part thereof, and alleged upon information and
 belief that there was a prior understanding upon the part of
 that the proceeds of the loan were not used for the purpose of
 paying and discharging such prior indebtedness, but were unlawfully
 misappropriated by the parties and persons of plaintiff. The
 answer contained a general denial of the allegations of complaint.
 The bill was filed for relief from the bill.
 An answer was filed on behalf of the defendant
 by their attorney at law, which answer admitted that the
 allegations of the bill, but denied that the proceeds of
 The cause was referred to a master in equity, who
 after hearing the evidence, filed his report recommending that a
 decree of foreclosure be entered.
 After overruling all exceptions to the master's report,
 the chancellor adopted the recommendations contained therein,
 except as to the amount found to be due and owing to plaintiff.
 The decree entered by the chancellor found that on or about 1924,
 Jan. 1924, and his wife became indebted to plaintiff in
 the sum of \$5,000 for money loaned to them and secured the mortgage
 sought to be foreclosed herein; that the complaint was the proper
 owner and holder of said mortgage; that there was a default in the
 terms and conditions thereof; that, at the time said loan was
 negotiated, there was no agreement of record against the plaintiff a trust
 deed to the People's Bank and Trust Co. to secure an indebtedness
 of \$5,000; that a portion of the proceeds of the loan made by com-
 plaint was to be used by the defendant for the purpose of
 paying off the indebtedness then due them of record; that, upon the

consummation of the transaction complainant on November 24, 1924, by a check payable to the order of Jan Kwiatkowski, paid to said Jan Kwiatkowski \$8,000 in due course; that such check was turned over to him with the agreement and understanding that a portion of the proceeds of said check was to be used for the purpose of paying off the trust deed to the Peoples Stock Yards State Bank; that it was the duty of the borrowers to convey to complainant corporation unincumbered real estate as security for the payment of such loan; and that the failure and neglect of the borrowers to pay off said trust deed cannot be held as vitiating the mortgage made by complainant corporation. As to the contention that the mortgage made by complainant corporation was in fact a second mortgage, the court found that complainant at a later date actually paid to the Peoples Stock Yards State Bank the money due and owing in connection with said trust deed; that a release deed was executed and delivered by said bank to complainant, which deed was duly recorded in the recorder's office of Cook county, June 22, 1933; and that the amount due and owing to complainant is as follows:

| | |
|--|--------------------|
| "Amount of principal due under Mortgage | \$8,000.00 |
| Interest thereon at 6% per annum, from September 18, 1924, to March 2, 1933, date of Master's Report | 4,060.00 |
| Amount due for membership fees and fines | 24.70 |
| Total | <u>\$12,084.70</u> |
| Less credit due for moneys paid to apply on said Mortgage | 1,901.20 |
| Balance due under said mortgage | <u>\$10,183.50</u> |
| Complainant's solicitors' fees | <u>500.00</u> |
| Total amount due to Complainant, including solicitors' fees | \$10,683.50." |

The decree ordered the foreclosure and sale of the premises.

Defendants contend that complainant's agent or agents misappropriated the \$8,000 for which complainant's check was

recognition of the corporation's obligation on November 14, 1934, by a check payable to the order of Jan Kozicki, paid to said Jan Kozicki \$3,000 in the amount that such check was turned over to him with the statement and understanding that a portion of the proceeds of said check was to be used for the purpose of paying off the first loan to the People's Loan and Savings Bank; that it was the duty of the borrower to convey to complainant corporation within sixty days after the date of the payment of such loan; and that the failure and neglect of the borrower to pay off said first loan cannot be held as constituting the mortgage made by complainant corporation. As to the contention that the mortgage made by complainant corporation was in fact a second mortgage, the court found that complainant at a later date actually paid to the People's Loan and Savings Bank the money due and owing in connection with said first loan; that a release deed was executed and delivered by said bank to complainant, which deed was duly recorded in the recorder's office of Cook County, June 22, 1935; and that the amount due and owing to complainant is as follows:

| | |
|--|-------------|
| Amount of principal and interest | \$3,000.00 |
| Interest thereon at 6% per annum, from September 18, 1934, to March 31, 1935 | 4,000.00 |
| Less credit for payments paid to pay off said mortgage | 1,000.00 |
| Balance due under said mortgage | \$6,000.00 |
| Complainant's solicitors' fees | 10,000.00 |
| Total amount due to complainant, including solicitors' fees | \$16,000.00 |

The decree ordered the foreclosure and sale of the premises. Defendant's content that complainant's agent of agents misrepresented the facts for which complainant's agent was

drawn and paid, and that Jan and Katarzyna Kwiatkowski did not receive any part of the proceeds of the check; and that Frank A. Kolesiak, secretary of the association, being disqualified as a witness under section 2 of the Evidence Act, there was no competent evidence in the record to sustain the findings of the master or the chancellor.

Complainant's theory is that the findings of the decree were amply supported by the evidence introduced before the master.

The transcript of the evidence introduced before the master, which is included in the record, discloses that one Bruno F. Kowalewski, who was the official notary public for the association, brought Jan Kwiatkowski and his wife to a meeting of the board of directors of the association so they might make an application for a loan; that the association was advised at that time that there was an existing incumbrance (trust deed) of \$5,000 against the property; that their application for membership in the association was accepted and the board of directors authorized a loan of \$8,000 to them; that September 18, 1924, Jan Kwiatkowski and his wife executed an agreement which set forth the terms of the payment of the loan and other terms and conditions upon which the loan was made; that on the same date they executed a mortgage for \$8,000 on the premises in question, as security for the loan, in the office of Kowalewski, which was acknowledged and witnessed by the employees of Kowalewski, or the Sherman Park State Bank, which occupied the same office as he did, and of which he was the president; that neither Jan Kwiatkowski nor his wife could write, and that they affixed their signatures to both the agreement and the mortgage by placing their "mark" thereon; that November 24, 1924, one Frank A. Kolesiak, secretary of the association, drew a check for \$8,000 to the order of Jan Kwiatkowski; that the

...and said, and that the said statements are not
 ...the proceeds of the stock; and that the
 ...of the Association, being illegal as a
 ...of the evidence, there was no competent
 ...in the record to sustain the finding of the
 ...

...theory is that the finding of the above
 ...by the evidence introduced before the master,
 ...of the evidence introduced before the
 ...in the record, although that was
 ...

...the official notice for the
 ...of the Association, and the fact that the
 ...of the Association as being a
 ...for a loan; that the Association was advised at that
 ...of \$5,000 (first debt) of \$5,000
 ...for mortgage in the
 ...of different mortgages a
 ...of \$5,000 to them; that the Association
 ...and his wife executed an agreement which was the basis of
 ...the payment of the loan and other taxes and conditions upon which
 ...the loan was made; that on the same date they executed a mortgage
 ...for \$5,000 on the premises in question, as security for the loan,
 ...in the office of Kowalski, which was acknowledged and witnessed
 ...by the signatures of Kowalski, on the witness, and also
 ...which occupied the same office as he did, and of which he was the
 ...that neither the witnesses nor the wife were
 ...and that they attested their signatures to both the agreement and
 ...the mortgage by signing their names; that on the 14th
 ...and Kowalski, secretary of the Association, then
 ...to the office of Jan Kowalski; that the

secretary testified that he brought Kowalewski with him on the night of November 24, 1924, after a meeting of the association, to deliver the check to Kwiatkowski at his home, without any explanation as to why he brought Kowalewski; that the secretary testified further that at the Kwiatkowski home "I handed them that - laid that check before them * * * Jan Kwiatkowski made that cross (indorsement on the check) and then I fill in his 'mark' above and below and put his name on the other side of it as Jan Kwiatkowski; also filled in the other lines as witness to his mark * * * it was left with Mr. Kwiatkowski * * * I went home after that * * *. It came through the Sherman Park State Bank six days later."

The transcript further disclosed that Kolesiak testified that he could not identify the signature "B. F. Kowalewski," which was indorsed on the back of the check (on the previous hearing of this cause he positively identified Kowalewski's indorsement); that he did not carry the check away with him and he did not know whether Kowalewski did or not; and that Kowalewski left the Kwiatkowski home with him.

The transcript also disclosed that Kowalewski committed suicide May 14, 1925, and that Kolesiak testified further that the association learned for the first time on October 2, 1926, that the \$5,000 indebtedness secured by the trust deed had never been paid and that the trust deed was still outstanding as a first lien against the property.

Defendants offered in evidence a certified copy of a claim for \$20,218.50, made by the association March 1, 1926, and allowed March 22, 1926, in the Probate court, against the estate of Bruno F. Kowalewski, which included an item "To cash advanced a/o J. Kwiatkowski...\$4500.00." Objection was made and sustained

to this offer and this claim was excluded from the evidence. The transcript further disclosed that a resolution was adopted by the board of directors of the association February 13, 1927, to pay the \$4,500 balance of the indebtedness secured by the outstanding trust deed and same was paid with interest and charges, aggregating \$5,331.76, and the trust deed was released; and that Kolesiak testified that the records of the association showed \$1,901.20 to have been paid on the \$8,000 mortgage account of the Kwiatkowskis, the last payment of \$275 having been made February 22, 1926.

It appeared that Kolesiak was the secretary of the association at the time he testified, as well as at the time of the transaction concerning which he testified, but the record is silent as to whether or not he was a shareholder or stockholder of the association when he testified.

It is urged that Kowalewski acted as the agent of the Kwiatkowskis in the loan transaction. There is not a scintilla of evidence in the record to sustain such contention. Complainant's own evidence is overwhelmingly to the contrary. Kowalewski was the official notary public for the association. From his title it is fair and reasonable to assume that it was his duty to prepare and see to the execution and acknowledgment of the instruments necessary to consummate loans made by the association. His employees prepared the Kwiatkowski mortgage and witnessed and acknowledged its execution. The secretary of the association testified that Kowalewski "made loans to people in his own bank and also brought applicants to the association for loans," and "yes, others, because he has been in connection with three or four building and loan associations." Kowalewski was in the business of making loans and it is idle to assert that, merely because he brought these applicants for a loan to the association, he was their agent. We think from the evidence it is reasonable to infer that, when the Kwiatkowskis

to this effect and this affidavit was signed by the witness. The
 transcript further stated that a resolution was adopted by the
 Board of Directors of the Association February 12, 1915, to pay
 the \$4,000 balance of the indebtedness incurred by the association
 from 1908 and 1909 and also with interest and charges, amounting
 to \$5,000.00, and the Board also resolved that the Association
 should have the balance of the indebtedness of \$1,000.00 to
 have been paid on the 1st of January 1915, and the Association
 the last payment of \$1,000 having been made January 25, 1915.
 It appeared that the Association was the creditor of the
 Association at the time the resolution was adopted and at the time of the
 transaction concerning which the resolution was adopted it did not
 as to whether or not it was a creditor of the Association at the
 Association when the resolution was adopted.
 It is urged that the Association was the creditor of the
 Association in the loan transaction. There is not a certificate of
 evidence in the record to show that the Association was the creditor
 own evidence is overwhelming to the contrary. The Association was
 the creditor of the Association for the Association, from the time
 it is felt and reasonable to believe that it was the duty to require
 and see to the execution and proper payment of the loan transaction.
 According to the Association's books and records, the Association was
 and prepared the Association's books and records and executed the
 the execution. The execution of the Association's books and records
 Association's books and records to people in his own name and also the
 Association to the Association for loan, and the Association, because
 has been connected with the Association for loan and loan transaction
 Association. Association was in the business of making loans and it is
 like to make them, and it is reasonable to believe that the Association
 a loan to the Association, and the Association, and the Association
 evidence it is reasonable to infer that, from the Association's

applied to Kowalewski for a loan, it was not feasible at the time to make the loan himself and that he brought them to the association, which he not only represented but in which he held a recognized office and title.

Did the Kwiatkowskis receive the \$8,000 represented by the association's check and for which they executed the mortgage?

Did the association and its officers experienced in the real estate mortgage business depend on Kwiatkowski, apparently an illiterate man unable to write even his own name and inexperienced with business transactions, to clear the title to the property in question?

Was the association willing to deliver to him the entire proceeds of the check and trust to his honor and honesty to pay out of same the indebtedness secured by the trust deed then a first lien upon the premises and which had to be released before the association's mortgage could become a first mortgage upon the property?

Why did the secretary of the association have Kwiatkowski indorse the \$8,000 check that night if it were intended that it be left with him?

If it were intended to leave the check with Kwiatkowski, was it not foolhardy and imprudent to insist upon its indorsement by him that night?

Why did the secretary of the association bring Kowalewski along with him that night to the Kwiatkowski home?

Was it not Kowalewski's function as notary public for the association to draw the necessary papers and make the necessary arrangements and payments to clear the title to the property?

After the secretary of the association insisted upon Kwiatkowski's indorsement on the check, is it not reasonable to infer from the evidence that Kowalewski took the check with him

applied to Kowalski for a loan, it was not possible at the time to make the loan himself and that he could then go to the association, which he not only represented but in which he held a personal office and title.

Was the Kowalski's motive for \$2,000 represented by the association's check and for which they received the mortgage? Was the association and its officers represented in the real estate mortgage business based on Kowalski's reputation? Was the association unable to make even its own name and insurances and business transactions, so clear the title to the property in question?

Was the association willing to deliver to him the entire proceeds of the check and trust to his honor and loyalty to pay out of same the indebtedness secured by the trust deed then a first lien upon the premises and which had to be released before the association's mortgage could become a first mortgage upon the property?

Was the secretary of the association aware Kowalski intended the \$2,000 check and might it be intended that it be left with him? It is not intended to have the check with Kowalski, was it not foolishly and imprudent to insist upon the interest by him that night?

Was the secretary of the association being Kowalski aware with him that night to the Kowalski house? Was it not Kowalski's function as notary public for the association to draw the necessary papers and make the necessary arrangements and payments to clear the title to the property? After the secretary of the association insisted upon Kowalski's involvement on the check, is it not reasonable to infer from the evidence that Kowalski took the check with him

as it was anticipated by the association that he would do and that he, the agent of the association, misappropriated the funds and failed to clear the title to the property or make the payment necessary to do so?

Did the association's claim against the estate of Bruno P. Kowalewski in the Probate court for "cash advanced a/o J. Kwiatkowski ...\$4500," which was allowed, but which was excluded from the evidence by the master, have any connection with or constitute an admission by the association that it held Kowalewski liable for misappropriating at least that much of the proceeds of the \$8,000 check?

It must be conceded that if the proceeds of the \$8,000 check were not received by the Kwiatkowskis but were misappropriated by the agent of the association, neither their estate, their heirs nor their property can be charged with the payment of same in this proceeding.

It is not only improbable but preposterous and beyond the realm of understanding and belief that, according to its theory of fact, the officers of this association with their experience in the real estate mortgage business, would, having been advised that there was an outstanding trust deed against the title to this property, and, we assume, having knowledge that under the law the association was restricted to making loans on unincumbered property, deliberately turn over to a man unable to write and inexperienced in business affairs its check for \$8,000, and leave it to him to do the things necessary to clear the title to the property in question. Reason and logic show the absurdity of such a theory.

We think it is reasonable to assume that the parties to the transaction did not contemplate that the task of closing the deal would be left to Kwiatkowski, nor that the full amount of the loan would be placed in his hands.

as it was anticipated by the association that it would be the
that the agent of the association, interpreted the matter
and failed to show the title to the property or make the payment
necessarily to be so.

Did the association's agent against the estate of
Wm. T. Nowicki in the estate matter for cash advanced by
J. Kalkowski... which was allowed, but which was concluded
from the advance by the matter, have any connection with or con-
stitute an obligation by the association to J. Kalkowski
in the for interpretation as least that such of the proceeds of
the \$3,000 check?

It must be concluded that if the proceeds of the \$3,000
check were not received by the Kalkowski but were interpreted
by the agent of the association, either their estate, their heirs
and their property can be charged with the payment of cash in this
proceeding.

It is not only impossible but impossible and beyond
the realm of understanding and belief that, according to the theory
of fact, the officer of this association with their experience
in the real estate mortgage business, would have been advised
that there was an outstanding loan owed against the title to this
property, and, as stated, having knowledge that under the law the
association was entitled to making loans on unimproved property,
deliberately turn over to a man no title or title and interpretation
in business where the loan for \$3,000, and leave it to him to
to the thing necessary to clear the title to the property in
question. Reason and law show the possibility of such a theory.
To think it is reasonable to assume that the parties
to the transaction did not recognize that the loan of money
the loan would be paid to Kalkowski, nor that the title remains
at the loan would be placed in the hands.

There was no concealment by him or misrepresentation as to the trust deed then outstanding as a lien against the property. In our opinion all that he bargained for and all that he expected to receive was the balance of the \$8,000 remaining after the indebtedness secured by the trust deed had been paid and discharged. We can imagine his surprise and consternation when the secretary of the association and Kowalewski made their nocturnal visit and insisted on turning over to him the entire \$8,000.

If the secretary of the association actually intended to deliver the check to the Kwiatkowskis so that they might deposit it or cash it and secure its proceeds, it is inconceivable that he should insist upon its indorsement that night. That would have been indeed a highly precarious method of doing business which could serve no useful or prudent purpose.

Kowalewski's office of notary public in the association surely must have imposed some duties upon him. From all of the evidence in this cause and the reasonable inferences that may be drawn therefrom, we are impelled to the conclusion that Kowalewski as notary public of the association was charged with the duty of consummating its mortgage transactions. That explains the necessity of the secretary of the association taking Kowalewski with him to the Kwiatkowski home and securing Kwiatkowski's immediate indorsement of the check, so that Kowalewski might take the check with him, pay off the then existing incumbrance and return the balance to Kwiatkowski. The evidence is conclusive that he did not pay the indebtedness secured by the trust deed and there is no direct evidence in the record that he returned any part of the proceeds of the check to Kwiatkowski.

The association insists that because its records

There was no conversation by him or his representative as to the fact that the defendant was a lien holder of the property. In our opinion all that he bargained for was all that he expected to receive was the balance of the \$8,000 remaining after the first payment was made by the first date had been paid and since then. He was making his money and his contribution then the property of the defendant and defendant made their personal visit and insisted on standing over him in the house.

12,000.

It is the property of the defendant which is intended to deliver the deed to the defendant. He is not liable to pay it or cash it and receive its proceeds, it is inconceivable that he should insist upon its interest. That night, that would have been indeed a highly prejudicial action of being the money which would have no money to pay him.

Kozlovski's office of attorney public in the defendant's name must have imposed some duties upon him. From all of the evidence in this case and the evidence introduced it may be seen that the defendant was not liable to be considered as Kozlovski as a matter of fact of the defendant was charged with the duty of representing the defendant's interests. That explains the necessity of the attorney of the defendant being Kozlovski. It is the defendant's name and signature Kozlovski's name is the name of the check, so that Kozlovski might have the check with him, pay off the bank without any further and return the balance to Kozlovski. The evidence is conclusive that he did not pay the defendant's money by the first date and there is no other evidence in the record that he returned any part of the proceeds of the check to Kozlovski.

The defendant insists that because the evidence

show payments on account of the Kwiatkowski mortgage indebtedness, the Kwiatkowskis must have received the money. There is no evidence in the record as to who made such payments, if they were made, and, in view of all the facts and circumstances as they are presented by the record in this cause, we are constrained to hold that there is nothing conclusive in the records of the association of such payments that the Kwiatkowskis received all or any part of the \$8,000. Kolesiak alone testified as to the association's records of payments on the Kwiatkowski mortgage account, and, by reason of the nature and character of his testimony as to the delivery of the \$8,000 check to Kwiatkowski, all of his testimony must be viewed with suspicion or entirely disregarded.

We are of the opinion that the master erroneously excluded from the evidence the association's claim against the Kowalewski estate in the Probate court and its allowance. It tended to show that at the time the claim was made the association charged Kowalewski with misappropriating at least \$4,500 advanced to him on Kwiatkowski's account. We think it was clearly admissible.

The association's right to the foreclosure of the \$8,000 mortgage has not been established by satisfactory evidence and we are convinced that justice demands a retrial of this cause.

As to defendants' contention that Kolesiak, the secretary of the association, was an incompetent witness and disqualified from testifying under section 2 of the Evidence Act, it is only necessary to state that his occupancy of the office of secretary did not disqualify him. Defendants cite cases to the effect that stockholders of corporations are disqualified under section 2. We are in full accord with the ruling as pronounced in the cases cited, but it was not shown in the instant case that Kolesiak was a shareholder or stockholder of the association. The statute specifically

the payments on account of the Kishinev mortgage, and the Kishinev bank has received the money. There is no evidence in the record as to who made such payments, if they were made, and, in view of all the facts and circumstances as they are presented in the record in this case, we are constrained to hold that there is no basis for the claim in the records of the association of such payments that the Kishinev bank received all or any part of the \$10,000. Kishinev bank testified as to the association's records of payments on the Kishinev mortgage account, and, by reason of the nature and character of his testimony as to the delivery of the \$10,000 check to Kishinev, all of his testimony must be viewed with suspicion or entirely disregarded.

The use of the opinion that the matter is conclusively excluded from the evidence the association's claim against the Kishinev bank in the Probate court and its witnesses. It is urged to show that at the time the claim was made the association did not know with any certainty that it had \$10,000 owed to him on Kishinev's account. We think it is fairly established.

The association's right to the balance of the \$10,000 mortgage has not been established by satisfactory evidence and we are convinced that justice requires a verdict of this court. As to defendant's contention that Kishinev, the secretary of the association, was an incompetent witness and that the testimony of the association's witnesses is not admissible, it is only necessary to state that his competency as a witness is not in question. Defendant also claims that the alleged fact of the delivery of the mortgage account is established by the testimony of the witnesses. In this regard with the ruling pronounced in the case cited, but it was not shown in the instant case that Kishinev was a holder or assignee of the mortgage. The statute specifically

provides that only shareholders may be directors of building and loan associations, but does not so specify as to the officers. It well might be that the secretary was not a shareholder and therefore not directly interested in the event of the action. If it were shown that he was a shareholder when he testified, then the statute disqualified him as a witness. Section 2, chapter 51, Cahill's 1933 Illinois Revised Statutes, provides as follows:

"No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person or as guardian * * * of any such heir, legatee or devisee, unless when called as a witness by such adverse party as suing or defending, * * *."

Interpreting this section of the Evidence Act in

Scott v. O'Connor-Couch, 271 Ill. 395, our Supreme Court said, page 398:

"The question whether a stockholder of a corporation is a competent witness to testify against the representative of a deceased person where the corporation will gain or lose as a result of a suit must be regarded as settled in this court and the position of counsel for appellee must be upheld. Stockholders in a corporation are owners of the income and earnings of the corporation and directly interested therein, and, * * * they are incompetent to testify for the benefit of the corporation against an heir-at-law, devisee or legatee. (Albers Commission Co. v. Sessel, 193 Ill. 153; Ittner Brick Co. v. Ashby, 198 id. 562; Cronin v. Royal League, 199 id. 228.)

The bill of complaint filed in this cause was not predicated upon the theory that the association had the right to foreclose any lien it may have had upon the property in question by reason of its payment of the indebtedness secured by the trust deed to which the property was subject at the time its \$8,000 mortgage was executed. The relief sought was the foreclosure of its mortgage because of the failure of the Kwitkowskis or their heirs or representatives to make the payments specified

on the \$8,000 which the association alleged the mortgage was executed to secure, and which it was alleged was paid to the Kwitkowskis.

While the master in his report recommended the allowance of the association's claim for the amount paid by it for the release of the aforementioned trust deed, the chancellor disallowed such claim in the decree before us for review.

Other points have been urged, but in the view we take of this cause we deem it unnecessary to discuss them.

For the reasons indicated herein the decree of the Circuit court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

on the 10,000 which the association alleged the mortgage was
executed to secure, and which it was alleged was paid to the
association.

While the court in its report recommended the allowance
of the association's claim for the amount paid by it for the re-
lease of the mortgaged premises, the court also directed
such claim in the event of a reversal.

Other points have been raised, but in the view we take
of this case we deem it unnecessary to discuss them.
For the reasons indicated herein the claim of the
association is reversed and the case is remanded.
Very truly yours,
J. J. Conover.

Delivered, at St. Louis, Mo., December 11, 1906.

37370

IN RE ESTATE OF LEWELLYN
SNYDER, deceased.

On appeal of CORA WARD GREGORY,
individually and as adminis-
tratrix of the estate of Anna
Lathron, deceased, WALTER SNYDER,
MAE EVANS, EFFIE WHITE and
MABEL COOPER,

Appellants,

v.

HELEN NORMIS, administratrix
de bonis non of the estate of
Lewellyn Snyder, deceased, and
GRACE SNYDER,

Appellees.

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

277 I.A. 627¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Lewellyn Snyder, a United States soldier in the late World war, applied for \$10,000 war risk insurance and a certificate for that amount of insurance payable in two hundred and forty monthly installments was issued to him in which his mother, Anna Lathron, was designated his beneficiary. No substitute or successor beneficiary was named and Snyder did not thereafter change the designated beneficiary.

Snyder died in service October 1, 1918, intestate, leaving surviving him a widow, Grace Snyder. His mother also survived him and as his beneficiary received the monthly payments specified in the certificate of insurance until the time of her death, April 22, 1927. Upon her death an administratrix of the insured's estate was appointed and the commuted value of the monthly installments, thereafter payable under the terms of the

STATION 2000, 10000

750. A. 1782

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

There is no doubt that the above information is correct and that the same is being furnished to the proper authorities for their consideration.

[illegible]

insurance contract, amounting to \$6,524 was paid by the United States War Risk Insurance Bureau to such administratrix for distribution under the laws of this state, of which Snyder was a resident when he entered the service of the United States as a soldier.

January 14, 1933, the administratrix of Snyder's estate filed her final account in the Probate court setting forth the distribution of the funds in her hands, which had been received from the Bureau of War Risk Insurance, less the costs of administration, to Grace Snyder, his surviving widow.

When Anna Lathron, the deceased soldier's mother and beneficiary died, she left her surviving five children, four of whom were sisters and the other a brother of Lewellyn Snyder. Cora Ward Gregory, one of Anna Lathron's daughters, was appointed administratrix of her estate. January 21, 1933, Cora Ward Gregory, as such administratrix, filed a petition in the Probate court objecting to the approval of the final account of the administratrix of the insured's estate, which showed the distribution of the entire fund to Grace Snyder, his surviving widow, and praying that the court order such administratrix to pay over to Cora Ward Gregory, administratrix of Anna Lathron's estate, such fund for distribution to the children of Anna Lathron, who were her only heirs.

The Probate court entered an order overruling the objections to the final account of the administratrix of Snyder's estate, disallowing the claim made in behalf of Anna Lathron's five children and approving the final account and report of the administratrix of the insured's estate.

Cora Ward Gregory, individually and as administratrix of the estate of Anna Lathron, perfected an appeal from this order to the Circuit court, where, after a trial de novo by the court without

insurance contract, amounting to \$5,000 was paid by the United States of New Hampshire. It was to which administrative for distribution under the laws of this state, of which there was a report and he stated the nature of the estate was as a soldier.

January 10, 1933, the administrator of the estate filed his final account in the Probate Court setting forth the distribution of the estate in his hands, which had been received from the Bureau of War Risk Insurance, less the costs of administration, to Grace Taylor, his surviving wife.

Then Anna Matheson, the deceased soldier's mother and beneficiary filed, she had surviving five children, four of whom were adults and the other a brother of William Taylor.

Corn and Gregory, one of Anna Matheson's daughters, was appointed administratrix of her estate. January 21, 1933, Corn and Gregory, as such administratrix, filed a petition in the Probate Court setting to the approval of the final account of the administratrix of the deceased's estate, which showed the distribution of the entire fund to Grace Taylor, his surviving wife, and praying that the court order such administratrix to pay over to Corn and Gregory, administratrix of Anna Matheson's estate, such fund for distribution to the children of Anna Matheson, who were her only heirs.

The Probate Court entered an order overruling the objection to the final account of the administratrix of the deceased's estate, allowing the claim made in behalf of Anna Matheson's five children and approving the final account and report of the administratrix of the deceased's estate.

Corn and Gregory, administratrix and as administratrix of the estate of Anna Matheson, petitioned an appeal from this order to the Circuit Court, where, after a trial de novo by the court without

a jury, the final account of the administratrix of the insured's estate was approved and the appeal from the Probate court was dismissed at appellants' costs.

That portion of the judgment order of the Circuit court allowing the appeal to this court was in the following language:

"* * * Cora Ward Gregory individually and as Administratrix of the estate of Anna Lathron, deceased, Walter Snyder, Mae Evans, Effie White, and Mabel Cooper pray an appeal from the judgment and order of this Court to the Appellate Court for the First District of Illinois, which appeal is hereby allowed to said Cora Ward Gregory individually and as Administratrix of the Estate of Anna Lathron, deceased, Walter Snyder, Mae Evans, Effie White and Mabel Cooper, upon their filing within thirty days (30) from this date their appeal bond with surety to be approved by this Court, in the penal sum of Two Hundred Fifty Dollars (\$250.00) conditioned that they successfully prosecute said appeal, otherwise to pay the judgment and costs * * *."

The appeal bond filed in this court was signed only by Cora Ward Gregory, individually and as administratrix of the estate of Anna Lathron.

Appellants contend that the insurance was payable only to the estate of the mother as her son's designated beneficiary, and that the final account of the administratrix of the soldier's estate should provide for the distribution of the entire fund in her hands to the estate of the deceased soldier's designated beneficiary.

Appellees contend that where a joint appeal is prayed and allowed all appellants must sign the appeal bond or the appeal, on motion, must be dismissed.

Appellees' theory on the merits of the case is that, under the laws of the United States relating to war risk insurance, the commuted value of the insurance was properly paid by the United States to the estate of the insured, rather than to the estate of the beneficiary upon the death of the beneficiary in 1927; that the fund in the hands of the administratrix of the deceased intestate soldier must be distributed as personal property in accordance with

the laws of the State of Illinois; and that under our laws all personal property goes to the surviving widow, where, as here, the deceased husband left surviving him a widow, but no child or children or descendant or descendants of a child or children.

March 10, 1934, Grace Snyder and the administratrix of the estate of Lewellyn Snyder, appellees, filed their motion to dismiss this appeal because (1) the appeal bond filed in this court is not in conformity with the order of the Circuit court allowing the appeal; and (2) it is not the bond of appellants, Cora Ward Gregory, individually and as administratrix of the estate of Anna Lathron, deceased, Walter Snyder, Mae Evans, Effie White and Mabel Cooper, in that it was not executed by all of them in person. Appellees' motion to dismiss the appeal was reserved to hearing. There several persons (six in this cause) prayed a joint appeal from a judgment of the Circuit court and such appeal is allowed to said several persons "upon their filing within thirty days * * * their appeal bond" one of such persons may not properly appeal by filing an appeal bond signed only by such appellant individually and as administratrix. The bond heretofore referred to is the only appeal bond in the record.

In support of their motion to dismiss this appeal appellees cite many Illinois Supreme court decisions which are directly in point. The identical question has been presented for determination many times and it has been repeatedly held that the right of appeal is purely statutory and that a party to avail himself of such a right must strictly comply with the order of the court granting the appeal, and when a joint appeal is prayed and allowed all of the appellants must sign the appeal bond or the appeal will, on motion, be dismissed. (First Congregational Church of Harvard v. Page, 235 Ill. 267;

The fact of the law of Illinois and that under the law all
personal property goes to the surviving wife, under the law,
the deceased husband left everything to his wife, and on this
children or descendants or testamentary heirs or legatees.
March 10, 1933, in the matter of the estate of
the estate of Joseph, deceased, their motion to
dismiss this appeal was overruled. (1) The appeal was filed in this
court is not in conformity with the order of the Illinois court
affirming the appeal; and (2) it is not the duty of the
court, and it is not, judicially and administratively of the
court of this court, to review, discuss, or pass upon, the
this and that appeal, in that it was not required by any of
law in person. Appealers' motion to dismiss this appeal was
reserved to hearing. Here several persons (as in this case)
pleaded a joint appeal from a judgment of the Illinois court and
such appeal is allowed to state several persons "when it is filed
within thirty days" - "their appeal was" one of such persons
may not properly appeal by filing an appeal and stand only by
such appeal individually and administratively. The court
hereafter referred to is the only appeal case in the record.
In support of their motion to dismiss this appeal appellees
also say Illinois courts cannot decide which was decided in
point. The identical question has been presented for consideration
many times and it has been repeatedly held that the right of appeal
is purely statutory and that a party to avoid himself of such a right,
must strictly comply with the order of the court granting the appeal,
and that a joint appeal is granted and allowed all of the appellants
and that an appeal case on the appeal will, on motion, be allowed.
(First Constitutional Amendment of Illinois, 1870)

Mileman v. Beale, 115 id. 355; Tedrick v. Wells, 152 id. 214;
Town v. Howieson, 175 id. 85; Ellison v. Hammond, 189 id. 470;
Fortune v. Gilbert, 207 id. 235.)

It has also been held that where a joint appeal has been prayed and allowed, if the appeal bond is signed by only one of the appellants, the appeal must be dismissed, and that the defect in perfecting the appeal cannot be cured by filing a new appeal bond in this court which is signed by all of the appellants. (First Congregational Church of Harvard v. Page; Tedrick v. Wells; Ellison v. Hammond.) (Supra.)

These rules of law have been long and well established by an unbroken line of authorities. We are, therefore, compelled to sustain appellees' motion to dismiss this appeal.

Notwithstanding the allowance of the motion to dismiss the appeal, we have carefully examined the record filed in this court, as well as the briefs of the respective parties, and have read the cases cited therein. We are of the opinion that, if we were called upon to determine the issues presented on this appeal on their merits, we would be constrained to affirm the judgment of the Circuit court.

For the reasons indicated herein the appeal should be and it is, therefore, dismissed.

APPEAL DISMISSED.

Gridley, P. J., and Scanlan, J., concur.

Winters v. Winters, 174 Cal. 100, 102 Cal. 100, 102 Cal. 100;
Winters v. Winters, 174 Cal. 100, 102 Cal. 100, 102 Cal. 100;
Winters v. Winters, 174 Cal. 100, 102 Cal. 100, 102 Cal. 100.

It has also been held that where a joint appeal has been

traced and allowed, it is proper to allow only one of
the appellants, the appeal must be dismissed, and that the defect
in permitting the appeal cannot be cured by filing a new appeal bond.

In this case, which is cited by all of the appellants, (Winters
Commercial Bank of California v. Winters, 174 Cal. 100, 102 Cal. 100, 102 Cal. 100;
Winters v. Winters, 174 Cal. 100, 102 Cal. 100, 102 Cal. 100).

These cases are not law, but will be followed by
an appellate line of authorities. We are, therefore, compelled to
dismiss appellants' motion to dismiss this appeal.

Notwithstanding the allowance of the motion to dismiss
this appeal, we have carefully examined the record filed in this
cause, as well as the briefs of the respective parties, and have
read the entire case therein. We are of the opinion that, if we
were called upon to determine the issues presented in this appeal
on their merits, we could be reasonably so within the framework
of the present case.

For the reasons stated herein the appeal should be

and it is, therefore, dismissed.

APPEAL DISMISSED.

Winters, 174 Cal. 100, 102 Cal. 100, 102 Cal. 100.

37795

ROOSEVELT COAL COMPANY,
a corporation, et al.

v.

EDWARD HADESMAN et al.

BRENTWOOD HOTEL, Inc.,
(Intervening Petitioner),
Appellee,

v.

EDWARD HADESMAN et al.,
Appellants.

On appeal of STELLA G.
HADESMAN and EDWARD I.
HADESMAN.

INTERLOCUTORY

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

277 I.A. 627²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

June 13, 1934, Roosevelt Coal Company and one Eugene Gelbapan filed a creditors' bill against Edward Hadesman and others, seeking to discover assets belonging to Hadesman. July 17, 1934, the Brentwood Hotel, upon leave granted, filed its intervening petition seeking principally the discovery of assets belonging to Hadesman in his possession or that of his wife, Stella G. Hadesman, or other defendants named in the original creditors' bill of complaint.

The intervening petition prayed an injunction restraining defendants from disposing of Hadesman's assets and from doing certain other things enumerated in the petition.

On the same day that the petition was filed the chancellor entered an order that defendants be enjoined pendente lite as prayed

255

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

47

• 57 80 (15) 100, 000, 000

1. (continued) 2. (continued) 3. (continued)

47

1. The Board of Directors shall have the authority to

.P 11175 to 11195
 .I 11175 to 11195
 .P 11175 to 11195

* R. 7611

CONFIDENTIAL

1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1862. It is a message of condolence to the people of the State of California, who have recently suffered a great calamity in the form of a severe earthquake. The President expresses his sympathy for the victims and offers his prayers for their recovery.

17. I am, Sir, very respectfully,
Your obedient servant,
J. H. P.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States.

... ..

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Downloaded from <http://ajphaphapublications.sagepub.com> at 11:00 11 November 2014

...the

It is not clear that the position was held by the same person.

... ..

in the petition of the Brentwood Hotel, upon its filing a surety bond in the sum of \$2,000 within five days. This interlocutory appeal followed.

When this appeal was reached for oral argument the solicitors for the respective parties advised this court that the cause was set for hearing on its merits in the Circuit court and suggested that the oral argument on the appeal be continued.

November 8, 1934, the solicitors for the parties informed this court that the Circuit court, after a full hearing of the cause, had dissolved the injunction pendente lite that it had issued July 17, 1934, and had dismissed the intervening petition of the Brentwood Hotel for want of equity.

Although the injunction which this appeal seeks to reverse has been dissolved by the trial court after a hearing on the merits, nevertheless the issue presented to this court by the appeal must be determined, but solely for the purpose of taxing the costs in this court.

We have carefully examined and considered the allegations of the intervening petition upon which the injunction was issued. We are of the opinion that it is in effect simply a creditor's bill and that it fails to allege essential and material facts necessary to state a cause of action under such a bill.

An order for a temporary injunction should not be granted where practically all of the material allegations bearing on the ultimate relief sought are made upon information and belief, as they were in the intervening petition in this cause. And it should only be granted where right to the ultimate relief is probable, and then on the theory of its necessity to prevent the substantial impairment of that right pendente lite. (Babcock v. Chicago Rys. Co., 236 Ill. App. 360.) No right to ultimate relief was established under the

in the position of the Government, upon the filing of a writ
brought in the sum of \$1,000 within five days. This is
expressed in the following:

Then this writ was granted for good reasons: the
petitioners had the necessary grounds which they could not
obtain was not the having on the basis of the writ could not
be granted that the writ was granted on the ground of necessity.

November 8, 1934, the petitioners for the writ of habeas
corpus filed the writ of habeas corpus, after a brief hearing of the court
and dismissed the petitioners without any cost to them and only
IV, 1934, and had dismissed the petitioners of the writ
and held for cost of a writ.

I heard the information which this writ seeks to recover
has been received by the writ court after a hearing on the writ,
consequently the writ was granted to this writ by the writ court
be determined, but solely for the purpose of taking the writ in
this writ.

It has been carefully examined and considered the allegations
of the petitioners petitioners upon which the information was received.
It is of the opinion that it is in all of the writs a writ of habeas
and that it is in all of the writs a writ of habeas
to make a writ of habeas corpus such a writ.

In order that a writ of habeas corpus should not be granted
there is a writ of habeas corpus of the writ of habeas corpus on the
writ of habeas corpus and the writ of habeas corpus and writ of habeas corpus
were in the writ of habeas corpus in the writ of habeas corpus. It is not only
be granted that it is the writ of habeas corpus in the writ of habeas corpus, and that
on the basis of the writ of habeas corpus in the writ of habeas corpus
of the writ of habeas corpus. (Writ of habeas corpus, writ of habeas corpus, writ of habeas corpus)
app. 250. It is the writ of habeas corpus and writ of habeas corpus under the

allegations of the plaintiff's petition and we are constrained to hold that the injunction pendente lite was erroneously granted.

For the reasons indicated herein the order of the Circuit court of July 17, 1934, granting an injunction pendente lite to the intervening petitioner is reversed.

REVERSED.

Gridley, P. J., and Scanlan, J., concur.

[illegible]

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the
4. fourth of these is the fact that the
5. fifth of these is the fact that the
6. sixth of these is the fact that the
7. seventh of these is the fact that the
8. eighth of these is the fact that the
9. ninth of these is the fact that the
10. tenth of these is the fact that the

[Faint, illegible handwritten notes]

8811

8811

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 627³

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 15 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1934

| | | |
|----------------------------|---|---------------------------|
| SYBILA FLORSCHUETZ , |) | |
| |) | |
| Appellee, |) | |
| |) | APPEAL FROM CIRCUIT COURT |
| VS. |) | OF LASALLE COUNTY. |
| |) | |
| CITY OF MENDOTA, ILLINOIS, |) | |
| a Municipal Corporation, |) | |
| |) | |
| Appellant. |) | |

HUFFMAN-J.

This was an action by appellee against appellant for damages alleged by appellee to have been sustained because of the failure of appellant to use reasonable care to keep a certain public sidewalk in reasonably safe condition. The walk in question was located upon Sixth street in the city of Mendota. It was constructed of stone flagging. The stone flags were 6 x 5 ft. in dimension. The walk in question was 12 ft. wide, consisting of two of the stone blocks set end to end, and extending from the front of the store buildings 12 feet to the curb line. The areaway underneath this walk was excavated and such space was used as cellars beneath the buildings. The edge of the stones that were next to the buildings, rested upon a brick ledge along said buildings. Down the middle of the sidewalk where the two flag stones met or joined, was a support running lengthwise of said walk. The outer edge of such walk rested at the curb line.

On the day in question, appellee stepped out of a store building upon the walk, whereupon one of the flag stones gave way and caused appellee to fall into the basement area below. The stone then fell through the opening, and it is claimed by appellee

that it fell with its full weight resting upon her. She called out for someone to remove the stone. Persons in the near vicinity immediately went to the rescue of appellee and removed the stone so that appellee could be relieved from the pressure thereof. A doctor was immediately called and came within a very few minutes. He found appellee in an unconscious condition. Appellee was removed to a hospital where it was determined that she had no fractures or broken bones. The testimony of the doctor discloses that from his examination of appellee he found that "she had a great many scuffs and scrapes on her skin," and that her entire body was more or less bruised and that the capillaries at various places about her person had ruptured causing discolorations under the skin, due to the hemorrhage therefrom. Following the accident appellee developed phlebitis in both legs, which causes the feet and legs to swell. The appellee was a large woman. The doctor estimated her weight at from 240 to 260 pounds at the time of the accident. Appellee at the time of the trial stated that her weight was 225 pounds some four or five years previous. The trial resulted in a verdict in favor of appellee for the sum of \$7000. Judgment was entered thereon and appellant brings this appeal to reverse that judgment.

The case was hotly contested and many questions of fact were at issue, among which was the question of the negligence of the city to use reasonable care to keep such sidewalk in a safe condition for public travel. Appellant maintained the defect was a latent one and not such as might be observable by reasonable examination, and that it had no knowledge the stone flag had become loosened at any of its places of support. Almost every question of fact in this case was sharply in dispute except

that the appellee fell through the walk.

We do not deem it expedient to discuss these controverted questions of fact at this time as the case must be reversed and remanded for other reasons.

Appellant objects to the instructions given on behalf of appellee. Thirteen instructions were given for appellee. Ten of these contained at the close thereof citations of authorities comprised of the title of the case and the volume and page where such decision was reported. Instruction number two concluded with the following citations: "Graham vs. City of Rockport, 203 Ill. 214. Affirming 142 App. 306; Also, Leslie vs. Chicago, 257 App. 633." Instruction number 3 concluded with the following citation: "City of Springfield vs. McCarthy, 79 App. 388." Instruction number four concluded the following citation: "City of Springfield vs. McCarthy, 79 App. 388." Instruction number five concluded with the following citation: "City of Lanark vs. Dougherty, 153 Ill. 163 (166)." Instruction number six concluded with the following citation: "Butler vs. John R. Thompson Co., 260 App. 625." Instruction number seven concluded with the following citation: "Daniels vs. People, 21 Ill. 439." Instruction number eight concluded with the following citation: "Town of Normal vs. Bright, 223 Ill. 99." Instruction number nine concluded with the following citation: "Long vs. City of Rock Island, 234 App 359." Instruction number ten concluded with the following citation: "Welch vs. City of Chicago, 323 Ill. 498. Affirming 236 App. 520." Instruction number thirteen concluded with the following citation: "Long vs. City of Rock Island, 234 App. 359." Appellant objects to the citation of authorities at the conclusion of appellee's instructions as above set out. While appellant urges that the same constitute reversible error, yet it affords this court no helpful references, but leaves the

court to its own devices.

Mr. Blashfield in this text book on instructions (1902) on page 410 thereof, with reference to instructions containing marginal citations of reports or text books, states that it should not constitute reversible error unless prejudice results therefrom to the complaining party. In cases where the court of review is of the opinion that the jury could not properly have returned any other verdict than that returned, then although the placing of marginal citations upon the instructions is improper, it is not necessarily erroneous under such conditions. But, where a case is purely one of fact, as the present one, and the facts are sharply in dispute, the amount of the verdict attacked, a different situation is presented than in a case where it is possible to say that the jury could have returned no other verdict.

There are holdings to the effect that since the jury is bound to accept the instructions given them by the court as being the law applicable to the case, that marginal citations could not make the instruction any more the law than it would be if they were not written thereon. *City of Jacksonville vs. Loar*, 65 Ill. App. 218. However, the Supreme Court in the case of *Wright vs. Brosseau*, 73 Ill. 381, 386, recognizes the fact that such reference to authorities would add strength to the instructions. This is a logical conclusion and such would be a most logical result upon the untutored mind. The jury cannot help but understand that such references are to decisions of higher courts sustaining the propositions of law incorporated in the instructions. It would not be unnatural to suppose that they would give to such instructions more weight than to those having no such sustaining authorities cited. They might readily assume on the one hand that those rules of law as announced in the instructions bearing

citations, had been sustained by higher courts, while as to those propositions of law submitted in the other instructions, they might naturally assume had no higher sustaining authority than that of the trial court.

The giving of instructions is an act of the court. It is the pronouncement of a court to the jury of the law applicable to the case. The fact that so many of plaintiff's instructions bore citations to the decisions of the Supreme and Appellate courts of this state, while none given on behalf of the defendant bore any such citations, could not help but attract the attention of the jury. While we are unable to say to what extent the jury was swayed or influenced by this, yet it presents a most dangerous situation and one fraught with so many uncertainties that it cannot be sanctioned as a general proposition of law. To do so would permit every instruction to become a brief on behalf of the party submitting it.

Appellee makes no reference to these instructions in her brief. Counsel for appellee stated in oral argument that if it was error, it was an unintentional error, as it had not been intended that these instructions should be presented to the court; but that copies thereof which bore no such citations had been expected to be so delivered, and by mistake these were given in their stead. It is stated in the case of Springer vs. Orr, 82 Ill. App. 558, 563, that instructions of this nature are improper. Again, in People vs. Bradley, 324 Ill. 294, 310, the giving of such instructions is said to be error. We do not understand that this means it is error under all circumstances. A record need not be free from all error, but it must be free from error which might be prejudicial to the rights of the complaining party. People vs. Schueneman, 320 Ill. 127, 135. People vs. Nusbaun, 326, Ill. 518, 528. It therefore becomes a question to be determined in each case, from all the facts and

circumstances, whether the error is deemed to have been prejudicial to the rights of the complaining party. We are compelled to the conclusion that in this instance, the giving of the above instructions was prejudicial to the defendant's rights and constitutes reversible error.

Appellant also objects to instruction number five given on behalf of appellee. This was appellee's only instruction on the measure of damages. It stated at the conclusion thereof as follows: "and if you further believe from a greater weight or preponderance of all the evidence that the plaintiff was injured at the time and place alleged in the declaration and that at the time and just prior to the injury she was in the exercise of reasonable care for her own safety, then the jury should find the defendant guilty and assess such damages as in the opinion of the jury would reasonably compensate the plaintiff for said injury." Appellant urges that this gave the jury the latitude to fix the amount of damages at such an amount as in their opinion would compensate the plaintiff, irrespective of the proof upon that question. Appellant affords this court no authorities on this point. However, instructions of this nature are held to be erroneous. In the case of Hopkins vs. Whelan, 217, Ill. App. 248, will be found a collection of cases in this state wherein instructions of this character have been held erroneous.

Other questions are raised by appellant which we do not deem advisable to discuss at this time.

After a careful consideration of the record and the facts presented therein, we are of opinion this case must be reversed and remanded for the reasons above indicated.

Reversed and remanded.

On the 1st of January, 1901, the following was the result of the census of the population of the United States, as taken by the Census Bureau, Washington, D. C.

U.S. GOVERNMENT PRINTING OFFICE: 1966

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

876

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 627⁴

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 15 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A.D. 1934.

| | | |
|---------------------|---|--------------------------|
| FLORENCE BLACK, |) | |
| |) | |
| Appellee, |) | APPEAL FROM COUNTY COURT |
| VS. |) | |
| |) | WINNEBAGO COUNTY. |
| WARREN H. GLEASMAN, |) | |
| |) | |
| Appellant. |) | |

HUFFMAN-J

Appellee filed her suit in trespass against appellant charging him with assault and battery. Appellee and her husband lived on a farm which they rented from appellant. The evidence discloses that on September 28, 1933, appellant was upon the premises directing some workmen in the repair of the house situated thereon. Some words were had between appellant and appellee, wherein it appears that appellant charged appellee with saying that he was cheap, (evidently referring to repair work needed upon the premises), and that appellee claimed she didn't, whereupon appellant insisted that she did. Appellant claims that appellee then called him a liar, whereupon it appears that appellant took appellee by the shoulders, shook her and pushed her backwards. Appellee then struck appellant in the face and appellant then struck appellee in the face, together with the exchange of certain heated remarks. Following this occurrence, the painters who were working there, appellee's husband, and appellant's son, quitted the two parties.

Following the above incident, appellee and her husband and appellant, went over to the garage where they talked over business matters for some ten or fifteen minutes.

1957

•

STAY IN THE HOUSE

Appellee claimed that as a result of the above altercation between herself and appellant, she became nervous and upset and could not eat and had severe backaches and headaches. Appellant claimed that he struck appellee because of the fact that she had a knife in her hand and he did not know what she might do with it. It appears that appellee was 27 years of age, and appellant 60, and that appellant used crutches with which to walk.

The jury returned a verdict in favor of appellee in the sum of \$750, upon which the trial court entered a remittitur of \$250, which the plaintiff accepted, and judgment was entered against appellant for \$500.

It is apparent from an examination of the records in this case that appellee came from the residence out upon the premises where appellant was standing; that she was in a fit of anger, and came directly to appellant and started the argument which resulted in the above affair, shaking her finger in his face and engaging him in a useless dispute. Mere abusive words will not justify an assault and appellant was wrong in the first instance in taking appellee by the shoulders and pushing her backwards. While the exchange of blows between the parties following the laying hold of appellee by appellant, might be the natural result of what went before, yet such conduct is not to be sanctioned upon the part of either party to this suit.

It is hereby ordered that this cause shall stand affirmed conditioned upon the appellee filing her remittitur in the sum of \$200 with the clerk of this court within thirty days from the filing date of this opinion, otherwise said cause to

be reversed and remanded.

Judgment affirmed conditioned upon appellee filing a remittitur in the sum of \$200 in this court within thirty days, otherwise to be reversed and remanded.

DEPARTMENT OF AGRICULTURE

WATER RESOURCES DIVISION
WASHINGTON, D. C.
OFFICE OF THE CHIEF HYDROLOGIST
WASHINGTON, D. C.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

7
66
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 628¹

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 15 1934

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1934.

Perry Hawkins,

Appellee,

vs.

Appeal from the Circuit Court

La Salle County

Edward Baker,

Appellant.

HUFFMAN - J.

Appellee instituted this suit against appellant before a Justice of the Peace, for wages claimed due by appellee from appellant. Trial in that instance resulted in a judgment in favor of appellee, Hawkins. Appellant herein prosecuted an appeal from that court to the circuit court of La Salle County, where jury was waived and the cause submitted to the court. The circuit court gave judgment in favor of appellee in the sum of \$101.75, and ordered that plaintiff below have execution therefor for wages earned and due. It is insisted by appellant that the judgment is erroneous in that it allowed to plaintiff below a judgment for wages as a laborer or servant within the meaning of Ch. 52, Sec. 16, para. 4, Cahill's St., with reference to the exemption of personal property as against a judgment for wages.

Appellee was a painter by trade and had lived in Streator, Illinois, some thirty years. On or about August 1, 1929, he claims to have entered into an agreement with appellant to paint the windows of a four story building located in Streator. Appellee insists that the contract was verbal, while appellant insists the same was written. Appellant, however, is unable to produce

IN THE APPELLATE COURT OF ILLINOIS

SECOND DIVISION

October Term, A. D. 1901.

Harry Hawkins,

Appellant,

vs.

Edgar Baker,

Appellee.

Appeal from the Circuit Court

of Cook County.

HUTCHINS - 1.

Appellee instituted this suit against appellant before a

justice of the peace, for a sum of money and the recovery there

of. Trial in that instance resulted in a judgment in

favor of appellee, \$500.00. Appellant brought proceedings to

appeal from that court to the circuit court of Cook County,

where it was tried and the same submitted to the jury. The

circuit court gave judgment in favor of appellee in the sum of

\$101.75, and ordered that appellee receive the same with interest

for each month and day. It is insisted by appellant that the

judgment is erroneous in that it allowed no credits for

payments for wages for a period of eight days and amounts

of \$2.50, \$2.00, \$1.00, \$1.00, \$1.00, \$1.00, \$1.00, \$1.00, \$1.00, \$1.00,

the aggregate of personal services rendered to appellee for

wages.

Appellant was a relatively free and not tied to district,

Illinois, some thirty years. On or about March 1, 1901, he claims

to have been then in possession of a certain sum of money and

amount of a sum of money which he claims to have been

indicated that the judgment was correct, and appellee's claim

the same was withdrawn. Appellee, however, is unable to produce

the written contract. It is further insisted by appellant that he made the contract on behalf of the Baker Brothers Company, Incorporated, as the President of such corporation. No controversy exists about the work being done. Appellee insists that he did not know who owned the building at the time, except that it was known as the Baker Building, and that the contract was made with appellant at his office in said building.

It appears from the evidence that the agreement between appellee and appellant for the work in question, was for/^astipulated contract price, and that appellee in performing the work employed other painters to assist him, whom he agreed to pay \$5 per day for their work. The trial court in entering judgment, provided that appellee should "have execution therefor for wages earned and due." This was improper under the evidence in the case.

However, after a careful examination of the record, we are satisfied that substantial justice has been done, and in accordance with the provisions of para. 92 of the Practice Act, Cahill's St. ch. 110, sec. 220, the judgment of the trial court is amended by striking therefrom the words: "and have execution therefor for wages earned and due." In all other respects, the judgment of the trial court is affirmed.

The clerk of this court will transmit a certified copy of this opinion to the clerk of the circuit court of La Salle county, who will make due entry of the above amendment to the judgment of the circuit court. whereupon plaintiff below shall have execution thereon accordingly.

Judgment of trial court amended in this court, and affirmed as amended.

Judgment of trial court amended and
affirmed as amended.

the witness continued. It is further located by evidence that he made the contract on behalf of the State of Tennessee, and that he was the owner of the land. He further stated that he was not known to the witness who made the contract, and that he was not known to the witness who made the contract. He further stated that he was not known to the witness who made the contract.

It appears from the evidence that the witness was not known to the witness who made the contract, and that he was not known to the witness who made the contract. He further stated that he was not known to the witness who made the contract, and that he was not known to the witness who made the contract. He further stated that he was not known to the witness who made the contract, and that he was not known to the witness who made the contract.

However, after a careful examination of the evidence, it appears that the witness was not known to the witness who made the contract, and that he was not known to the witness who made the contract. He further stated that he was not known to the witness who made the contract, and that he was not known to the witness who made the contract. He further stated that he was not known to the witness who made the contract, and that he was not known to the witness who made the contract.

The witness further stated that he was not known to the witness who made the contract, and that he was not known to the witness who made the contract. He further stated that he was not known to the witness who made the contract, and that he was not known to the witness who made the contract. He further stated that he was not known to the witness who made the contract, and that he was not known to the witness who made the contract.

Statement of the witness who made the contract, and that he was not known to the witness who made the contract. He further stated that he was not known to the witness who made the contract, and that he was not known to the witness who made the contract.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 628²

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 15 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1934.

| | | |
|----------------------|---|---------------------------|
| DAVID M. DUBIN, |) | |
| |) | |
| Plaintiff-Appellant, |) | |
| |) | APPEAL FROM CIRCUIT COURT |
| VS. |) | |
| |) | LEE COUNTY. |
| JOHN FELLOWS, |) | |
| |) | |
| Defendant-Appellee. |) | |

HUFFMAN-J

This was a complaint filed by appellant in the circuit court of Lee county, on May 15, 1934, seeking to enforce specific performance of an option to lease. Appellee filed his motion to dismiss the complaint assigning among other grounds that the complaint did not show sufficient facts to constitute the cause of action; that under the allegations thereof, appellant was not entitled to the relief prayed for; that no right existed in appellant to maintain said suit; that no privity was shown to exist between appellant and appellee; that no acceptance was shown to have been made known by appellant to appellee; that no consideration was alleged; that the contract sought to be performed by appellant was not in writing and was not to be performed within one year; and that the alleged contract was indefinite and uncertain with reference to contemplated remodeling of a building. The complaint was dismissed for want of equity and judgment entered against appellant for costs. Appellant prosecutes this appeal from that judgment.

The complaint alleges that one R. Levine and H. J. Eschbach of Chicago, were engaged in looking for a suitable building outside of the city of Chicago, in which a moving

7-14550

picture theater might be installed. The bill alleges that the two above named parties were seeking such a location for and on behalf of appellant. In the city of Dixon they met appellee and procured from appellee the following instrument:

"March 13, 1934.

Mr. R. Levine,

Mr. H. J. Eschbach.

Gentlemen:

I hereby give you the exclusive right for thirty days to lease for theatre my property located 313 First Street, Dixon, Illin is, for a period of twenty years at the following terms:

\$80.00 per month 1st year.

\$90.00 per month 2nd year.

\$100.00 per month 3 to 10 year inclusive.

\$125.00 per month 10 to 15th yr. inclusive.

\$150.00 per month 15 to 20th yr. inclusive.

Building to be accepted by your clients as is with the exception of heating plant, which I agree to equip to furnish sufficient heat at all times.

JOHN FELLOWS,

713 Peoria Ave.,
Dixon"

Appellant alleges acceptance under said option by virtue of the following letter:

"April 10, 1934.

Mr. R. Levine,

Mr. H. J. Eschbach.

Gentlemen:

I hereby accept lease for theatre the property

which the present state of the subject. The bill is now in the hands of the committee on the subject of the bill. It is now in the hands of the committee on the subject of the bill. It is now in the hands of the committee on the subject of the bill.

March 12, 1904.

Mr. W. L. Dill,
Mr. W. L. Dill.

Dear Sir:

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the bill. I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the bill. I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the bill.

100.00 per cent per year.
100.00 per cent per year.

100.00 per cent per year.
100.00 per cent per year.
100.00 per cent per year.
100.00 per cent per year.
100.00 per cent per year.
100.00 per cent per year.
100.00 per cent per year.
100.00 per cent per year.
100.00 per cent per year.
100.00 per cent per year.

Very truly,
W. L. Dill.

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the bill. I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the bill.

Very truly,
W. L. Dill.

Mr. W. L. Dill,
Mr. W. L. Dill.

Dear Sir:

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the bill. I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the bill.

located at 313 First Street, Dixon, Illinois, for a period of twenty years at the following terms:

\$80.00 per month 1st year.

\$90.00 per month 2nd year.

\$100.00 per month 3rd year to 10 yr. incl.

\$125.00 per month 10th year to 15th yr. incl.

\$150.00 per month 15th year to 20th yr. incl.

Building is accepted as is, with the exception of heating plant, which owner agrees to equip to furnish sufficient heat at all times.

DAVE DUBIN,

914 So. Wabash Ave.,

Chgo.

Appellant alleges that he is ready and willing to carry out the terms of the option sought to be enforced. He alleges that on April 30, 1934, he presented a lease to appellee to sign pursuant to the terms of said option and that appellee refused to sign same.

It is manifest from the foregoing instrument signed by appellee that the appellant was a stranger to the option. Nor does it appear that the same was executed for or on his behalf or benefit, by Levine and Eschbach. Appellant directs the above letter under date of April 10, 1934, to the said Levine and Eschbach. Appellant claims that subsequent to the above letter of April 10, 1934, he met appellee and that appellee then agreed verbally to execute a lease to him. If appellant seeks to obtain a lease to the premises upon the verbal promise or agreement of appellee, then the Statute of Frauds intervenes. And an acceptance of an option to be good, and to entitle the holder to a specific performance, must be such as to conclude an agreement or contract between the parties.

[illegible]

• 100% Satisfaction Guarantee •

* Entry 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918

.001 .17 CI of TRAY BIC 2.19 TO 60.00

151.00 per month 10th 1st to 10th 2nd 1961.

100.00

Nothing appears in the complaint to indicate such an agreement between appellant and appellee.

Specific performance will not be granted unless the instrument sought to be enforced is mutually binding upon the parties. *Tink vs. Walker*, 148 Ill. 234, 240; *Suburban Con. Co. vs. Naugle*, 70 Ill. App. 384; *Winter vs. Trainor*, 151 Ill. 191. The terms of the contract must be mutually binding as to all parties, and the remedies between the parties must be mutual, before a court of equity will grant a specific performance. No mutuality appearing to exist upon the face of the complaint between appellant and appellee, and it further appearing that appellee refused to accept appellant's verbal offer to rent or lease, the bill was properly dismissed. *Webb vs. Hill*, 261 App. 268, 271.

The order and decree of the circuit court of Lee county is affirmed.

Order and decree affirmed.

Nothing appears in the complaint to indicate such an agreement
between appellant and appellee.
Appellee's evidence will not be taken unless the
instrument sought to be admitted is actually admitted under the
parties. This was held, 143 Ill. 524, 525; 143 Ill. 524, 525.
The terms of the contract must be mutually binding as to all
parties, and the contract between the parties must be valid;
before a court of equity will grant a specific performance.
No mutually binding contract can be made by the parties.
Between appellee and appellee, and it follows necessarily that
appellee cannot be bound by such a contract, and it is not to be
enforced, and will not be enforced. 143 Ill. 524, 525.
143, 525.
The order and decree of the circuit court of the
county is affirmed.
That the same be affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

6/

7 68

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 628³

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 15 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1934

Frank Engelhaupt,

Appellant,

Appeal from County Court

vs.

Putnam County

John R. Cox, Sr., and

Laura Cox,

Appellees.

HUFFMAN-J.

This was an action in assumpsit brought by appellant against appellees for \$500 claimed by appellant to be due him from appellees according to their certain promise to pay him such amount as commission for obtaining for them a loan of \$6000. It appears that appellees' son, John R. Cox, Jr., was the husband of appellant's sister, and that in the course of a conversation, appellees made known to said daughter-in-law their need of the above loan, and that she stated to them she thought it would be possible for appellees to procure the loan from her folks. The daughter-in-law called her brother, the appellant, by telephone. Following this, and within a day or two, appellant came from Chicago to the home of appellees where he stated that he could get the money from his father, but in order to do so it would necessitate a loss of \$70 to be incurred by the liquidation of certain securities. Appellees paid this \$70 to appellant. The loan was procured and subsequently paid by appellees together with the interest due thereon.

Following the payment of the loan, appellant brought this suit claiming \$500 to be due him from appellees as his commission for procuring the loan, in accordance with their promise made at the time, Appellees denied making the promise and appellant insisted they did.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY

Frank Gresham,

Appellant,

vs.

John R. Cox, Jr., and

Laura Cox,

Appellees.

NOTES

This was an action in assumpsit brought by appellant against

appellees for \$500 claimed by appellant to be due him from

appellees according to their certain promise to pay him such amount

as commission for obtaining for them a loan of \$5000. It appears

that appellees' son, John R. Cox, Jr., was the husband of appellant's

sister, and that in the course of a conversation, appellees made

known to said daughter-in-law their need of the above loan, and that

she stated to them she thought it would be possible for appellees to

procure the loan from her father. The daughter-in-law called her

brother, the appellant, by telephone. Following this, and within

a day or two, appellant came from Chicago to the home of appellees

where he stated that he would get the money from his father, but

in order to do so it would necessitate a loan of \$500 to be loaned

by the liquidation of certain securities. Appellees said that

\$500 was available. The loan was procured and immediately paid by

appellees to appellant who thereupon

following the payment of the loan, immediately came to the

son's residence \$500 to be due him from appellees as the commission

for procuring the loan, in accordance with their previous make

at the time, liquidated demand which the parties had agreed

insisted they did.

Upon a trial of the cause the jury returned a verdict in favor of appellant for the sum of \$180, from which he brings this appeal to reverse the case urging that under the evidence he was entitled to a verdict of \$500 or nothing.

The record in this case contains no placita. "A fatal defect is the want of a placita." Hardy v. Jones, 307 Ill. 149. It is indispensable that the record show a placita or convening order of the court. City of Alton v. Heidrick, 248 Ill. 76. It appears in the opinion in the above case on page 80 thereof, that at one term of the Supreme Court fifty three cases were reversed for want of a placita or convening order. The record must contain a placita. Rich v. City of Chicago, 59 Ill. 286, 298; People v. Wollack, 329 Ill. 195; People v. Brewerton Coal Co., 253 Ill. App. 414.

Controversial matters being involved in this case, and the record containing no placita, is thus so obviously defective that the merits of the controversy can not be considered and disposed of.

The appeal will therefore be dismissed.

Appeal dismissed.

Upon a trial of the case the jury returned a verdict in favor of defendant for the sum of \$100, from which he brings this appeal to reverse the said ruling and under the evidence as was entitled to a verdict of \$200 or more.

The record in this case contains no exhibits. A fatal defect is the want of a bill of particulars. It is indistinguishable that the record shows a bill of particulars of the facts. City of Alton v. Alton, 202 Ill. 75. It appears in the opinion in this case that the bill of particulars, that at one time of the Supreme Court fifty cases were reversed for want of a bill of particulars. The record must contain a bill of particulars. 202 Ill. 75; 202 Ill. 75; People v. Wolfson, 202 Ill. 195; People v. Wolfson, 202 Ill. 195.

Confidential matters being involved in this case, and the record containing no exhibits, it is so obviously defective that the merits of the controversy can not be considered and disposed of.

The case will therefore be dismissed.

Respectfully,
Dismissed.

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8864

7 69

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 628⁴

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 15 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1934

The First Sterling National
Bank of Sterling, Illinois,
by Fred Salm, Receiver,

Appellant,

vs.

Appeal from City Court of

Sterling, Illinois

Gerhard Behrens, et al.
(Gerhard Behrens and Carl
Cornelius, Executor of the
Estate of S. E. Cornelius,
Deceased).

Appellees.

HUFFMAN-J.

This is an appeal brought by appellant from the city court of the City of Sterling. The suit is a foreclosure proceeding instituted by appellant on April 6, 1934, to foreclose a real estate mortgage which had been executed by Gerhard and Mary Cassens, in favor of The First Sterling National Bank of Sterling. The bill of complaint set up that appellees had or claimed some interest in the premises as judgment creditors of said mortgagors. The premises were sold under decree in the foreclosure proceeding, and brought the sum of \$2900. The decree found that there was due appellant by virtue of the note secured by said mortgage, the sum of \$1668.98. After payment of costs and fees, the Master had a surplus of \$1136.77 from the sale of the premises.

It appears that appellee, Behrens, was a judgment creditor of Cassens, recovering two judgments on October 10, 1933, totaling the sum of \$2293.50; and that appellee, Cornelius, recovered two judgments against Cassens on October 10, 1933, totaling the sum of \$1805.45. The appellant was also a judgment creditor of Cassens having recovered a judgment on October 17, 1933, in the sum of \$1235.44.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1934

The First Sterling National
Bank of Sterling, Illinois,
by Fred Selva, Receiver,

Appellant,

Appeal from City Court of

Sterling, Illinois

vs.

Gerhard Behrens, et al.
(Gerhard Behrens and Carl
Cornelius, Executors of the
Estate of G. M. Cornelius,
Deceased).

Appellees.

HUTCHINSON-1.

This is an appeal brought by appellant from the city court
of the City of Sterling. The suit is a foreclosure proceeding in-
stituted by appellant on April 6, 1934, to foreclose a real estate
mortgage which had been executed by Gerhard and Mary Behrens, in
favor of The First Sterling National Bank of Sterling. The bill
of complaint set up that appellees had or claimed some interest in
the premises as judgment creditors of said mortgagors. The premises
were sold under decree in the foreclosure proceeding, and brought
the sum of \$2900. The decree found that there was due appellant
by virtue of the note secured by said mortgage, the sum of \$1868.98.
After payment of costs and fees, the latter had a surplus of \$133.77
from the sale of the premises.

It appears that appellees, Behrens, was a judgment creditor
of Cassius, recovering two judgments on October 10, 1933, total-
ing the sum of \$235.50; and that appellees, Cornelius, recovered
two judgments against Cassius on October 10, 1933, totaling the
sum of \$1905.42. The appellant was also a judgment creditor of
Cassius having recovered a judgment on October 17, 1933, in the
sum of \$133.44.

The court by its decree ordered the Master to apply the remaining surplus from the sale of the premises to the satisfaction of appellant's judgment, and the Master in making his report of distribution, so disclosed the application of such surplus. Whereupon, appellees filed their motion to set aside the Master's report of distribution of the proceeds of the sale in so far as the \$1136.77 surplus was concerned, and asked that the court order the Master to bring said surplus into court to await the disposition thereof. Appellees set up by their motion that their judgments were prior to that of appellant; and further, that the only relief prayed for in the complaint for foreclosure was the right to foreclose the mortgage and to receive the amount due in the note secured thereby. Appellees claimed the right to pro rate with appellant in the surplus. Appellant filed its motion to strike the motion of appellees. Appellant's motion to strike was denied, the court vacated the Master's report of distribution to the extent of the surplus, and ordered him to bring same into court for disposition thereof. From the denial of its said above motion, appellant has prosecuted this appeal.

The court had jurisdiction of the parties and of the subject matter, and has as yet made no final disposition of the surplus. We do not perceive how the rights of any of the parties can be said to be aggrieved at this time. Nor are we of the opinion the court committed any abuse of discretion in the order made. No argument has been advanced nor authorities submitted which would incline this court to the belief that any error was committed by the Chancellor.

Appellant does not set out the errors relied upon for reversal. The present Practice Act in force in this state does not require an assignment of errors to be attached to the record and printed in the abstract. Nor did the Practice Act of 1907 contain

The court by its decree ordered the Master to apply the proceeds of the sale of the property to the satisfaction of the judgment, and the Master in making his report of distribution, so disclosed the qualification of such property. Upon appeal, appellants filed their motion to set aside the Master's report of distribution of the proceeds of the sale in as far as the said \$100,000.00 was concerned, and asked that the court order the Master to bring said surplus into court to await the disposition thereof. Appellants set up by their motion that their judgments were prior to that of appellees; and further, that the only valid ground for the complaint for foreclosure was the right to foreclose the mortgage and to receive the money due in the note secured thereby. Appellees claimed the right to proceed with appellants in the same manner. Appellant filed its motion to strike the motion of appellees. Appellant's motion to strike was denied, the court vacated the Master's report of distribution to the extent of the surplus, and ordered him to bring said surplus into court for its distribution. From the denial of its said motion, appellant has prosecuted this appeal.

The court had jurisdiction of the parties and of the subject matter, and has not made any final disposition of the surplus. It is not perceived how the denial of any of the parties can be said to be prejudicial at this time. For one of the reasons the court committed any issue of distribution in the order made. No argument has been advanced in support of the proposition that would incline the court to the belief that any error was committed by the Chancellor.

Appellant does not set out the errors relied upon for reversal. The present position is in favor of the state and requires an affirmance of the decree as the reason and ground for the reversal. With the exception of the \$100,000.00

any provision requiring an assignment of errors to be attached to the record and printed in the abstract. This was then required by rule 11 of the Supreme Court and by rule 12 of this court. Under rule 23 of the schedule of rules as set out in the present Practice Act, it is provided that the appellant shall file a printed brief which shall among other things contain, "the errors relied upon for a reversal." This rule is supplanted by rule 39 of the Supreme Court and by rule 9 of this court, which both provide that the brief of appellant shall contain, "the errors relied upon for a reversal." Courts of review have inherent power to institute and prescribe rules of practice and such rules when established have the force of law and are obligatory upon the court as well as upon the parties. There is no attempt made by appellant to set out in his brief the errors relied upon for a reversal. Under such circumstances, there is nothing presented to this court for review. *Butters v. C. B. & Q. Ry. Co.*, 154 Ill. App. 275; *Frick v. Aurora E. & C. Ry. Co.*, 154 Ill. App. 276. It is not the duty of a court of review to become counsel for either party litigant. Under the established rules of practice, an appellant must present to the court of review the errors upon which he relies for a reversal.

For the foregoing reasons, this appeal is dismissed.

Appeal dismissed.

any provision regarding an assignment of errors to be reviewed in the record and printed in the abstract. This was then revised in rule 11 of the Supreme Court and by rule 12 of this court. Under rule 23 of the schedule of rules set out in the present practice Act, it is provided that the appellant shall file a printed brief which shall contain other things contained, "the errors relied upon for a reversal." This rule is supplemented by rule 28 of the Supreme Court and by rule 9 of this court, which both provide that the brief of appellant shall contain, "the errors relied upon for a reversal." Courts of review have inherent power to institute and prescribe rules of practice and such rules may be established upon the basis of law and are obligatory upon the court as well as upon the parties. There is no attempt made by appellant to set out in his brief the errors relied upon for a reversal. Under such circumstances, there is nothing presented to this court for review. *Batters v. U. S. S. 134 Ill. App. 370*; *U. S. S. 134 Ill. App. 370*; *U. S. S. 134 Ill. App. 370*; *U. S. S. 134 Ill. App. 370*. It is not the duty of a court of review to set out a court for either party appellant. Under the established rules of practice, an appellant must present to the court of review the errors upon which he relies for a reversal. For the foregoing reasons, this appeal is dismissed. Appeal dismissed.

STATE OF ILLINOIS. }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8814
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 629¹

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 30 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A.D. 1934

Harry A. Frankel, Trustee in
Bankruptcy of National Airways
System, Inc.

(Plaintiff) Appellee,

vs.

Appeal from the Circuit Court

of Peoria County

Fred Albrecht, et al,
Defendants,

George Moehlenhoff,
(Defendant) Appellant.

WOLFE - P.J.

Harry A. Frankel, as trustee in bankruptcy of National Airways System, incorporated, filed a bill in equity in the circuit court of Peoria County for the purpose of collecting the amounts due on stock subscriptions to the bankrupt corporation. The bill alleged that George Moehlenhoff subscribed for 500 shares of the capital stock of said corporation and agreed to pay therefor the sum of \$10.00 per share, or a total of \$5,000.00. The complainant offered proof to support his contention by a subscription blank signed by the defendant, which is as follows: "Class "D" Securities under the Illinois Securities Law. Optional Subscription. Original. Telephone 4-4010, These are Speculative Securities. National Airways System, Inc. Incorporated under the laws of the State of Delaware. Manufacturers of Air-King Airplanes. Offices 1019 Peoria Life Bldg., Peoria, Ill. I hereby subscribe for 500 shares of Preferred stock of the National Airways System, Inc., and agree to pay therefor \$10.00 per share (par value) \$10.00 as follows: \$5,000.00 cash herewith \$...... It is understood and agreed that a certificate shall be issued to me, as and when an amount equal to a share, or multiple thereof, herein purchased shall

1890

have been paid. Dated May 20, 1929. This Subscription is subject to Cancellation in 60 Days if Not Taken up.

.....Agent.

.....Address.

Name of George Moehlenhoff (Signed) Occupation, Jeweler.

Address, 1027 S. Adams St.,

City and State, Peoria, Ill."

To the original bill the defendant filed his answer. He admits that he signed the subscription paper, but denies that he is liable to pay the amount of said subscription for the reason that it is an optional subscription; that he was promised a position with the corporation if he signed said subscription; that the corporation failed and refused to give him the position promised. The appellant in his brief says: "This entire case rests upon the interpretation to be given to the above and foregoing exhibit. (Meaning the subscription blank) whether it is a subscription contract or an agreement to subscribe at some future date." The appellee admits this is the only question involved in the case.

From an examination of this document it is our opinion that it is an out-right subscription to buy stock. The appellant contends that the trial court erred in rendering judgment against him, because he had what appears to be a copy of the original subscription on which is written in pencil, "With the understanding that I be put on the Board of Directors". It is conceded that the defendant never was put on the Board of Directors of the company; therefore, the defendant contends that the consideration for said contract has failed, and that he is not liable on his stock subscription.

From an examination of the exhibit in the record it appears that it is not signed by the National Airways System, Inc., nor by the defendant. In the case of Jewell vs. Rock River Paper Co., 101 Ill. 57, a suit was brought by creditors of a Chicago publishing

have been paid. (Date July 20, 1911. This amount is to be paid to the Government in 1912.)

THE GOVERNMENT OF THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

Office of the Commissioner of the General Land Office, Washington, D.C.

June 1, 1911.

Mr. J. M. Smith, Secretary of the Interior, Washington, D.C.

Dear Sir: I have the honor to acknowledge the receipt of your letter of the 28th inst.

and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

Very respectfully,
J. M. Smith, Secretary of the Interior.

Enclosed for you are two copies of a report of the Commissioner of the General Land Office, dated June 1, 1911.

I am, Sir, very respectfully,
Your obedient servant,
J. M. Smith, Secretary of the Interior.

Very respectfully,
J. M. Smith, Secretary of the Interior.

Enclosed for you are two copies of a report of the Commissioner of the General Land Office, dated June 1, 1911.

I am, Sir, very respectfully,
Your obedient servant,
J. M. Smith, Secretary of the Interior.

Very respectfully,
J. M. Smith, Secretary of the Interior.

Enclosed for you are two copies of a report of the Commissioner of the General Land Office, dated June 1, 1911.

I am, Sir, very respectfully,
Your obedient servant,
J. M. Smith, Secretary of the Interior.

Very respectfully,
J. M. Smith, Secretary of the Interior.

Enclosed for you are two copies of a report of the Commissioner of the General Land Office, dated June 1, 1911.

I am, Sir, very respectfully,
Your obedient servant,
J. M. Smith, Secretary of the Interior.

Very respectfully,
J. M. Smith, Secretary of the Interior.

Enclosed for you are two copies of a report of the Commissioner of the General Land Office, dated June 1, 1911.

I am, Sir, very respectfully,
Your obedient servant,
J. M. Smith, Secretary of the Interior.

Very respectfully,
J. M. Smith, Secretary of the Interior.

Enclosed for you are two copies of a report of the Commissioner of the General Land Office, dated June 1, 1911.

I am, Sir, very respectfully,
Your obedient servant,
J. M. Smith, Secretary of the Interior.

Very respectfully,
J. M. Smith, Secretary of the Interior.

Enclosed for you are two copies of a report of the Commissioner of the General Land Office, dated June 1, 1911.

I am, Sir, very respectfully,
Your obedient servant,
J. M. Smith, Secretary of the Interior.

Very respectfully,
J. M. Smith, Secretary of the Interior.

house against several subscribers to the stock of the corporation, which was then insolvent. The court in discussing the liability of the parties subscribing used the following language, "It is also urged that a large portion of the stock of the present company is colorable, and fictitious - that the subscribers, in some instances, were notoriously insolvent, and in others it was expressly understood that payment was not expected or to be exacted, in other cases only a part of the subscription was to be paid, and in some instances payment was to be made in services of some kind instead of money. While it is conceded there is some evidence tending to establish this claim, yet there are two sufficient reasons why it cannot avail here: In the first place, it is clear that the creditors of the company cannot be affected by mere private understanding between subscriber and the subscription agent of the company, by which the former is exonerated from the performance of that which his subscription, by its terms, plainly requires. To permit such a thing would be to sanction a palpable fraud upon the creditors of the company and the other stockholders."

It is the opinion of the court that the subscription for stock signed by the defendant could not be varied or explained by oral testimony and the copy of the subscription blank offered by the defendant should not be considered to vary the terms of a written contract. The court properly held that the defendant was liable on this subscription for this stock together with interest upon the same.

The judgment of the circuit court of Peoria County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8670
927
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 629²

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 30 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.

October Term, A. D. 1934.

| | | |
|--------------------------|---|------------------|
| FRED J. TRUDEAU, |) | |
| Plaintiff: Appellee, |) | |
| |) | |
| vs. |) | Appeal from the |
| |) | County Court of |
| |) | Kankakee County. |
| CENTRAL MUTUAL INSURANCE |) | |
| COMPANY, |) | |
| Defendant: Appellant. |) | |

WOLFE * * P. J.

Fred J. Trudeau started a suit against the Central Mutual Insurance Company in the County Court of Kankakee County to recover loss sustained by him through the burning of his automobile. The declaration consisted of one count and set forth the insurance policy sued upon in hac verba. To this declaration the defendant filed the general issue and two special pleas, claiming that the plaintiff made misrepresentations in his application for insurance. The case was tried before a jury which rendered a verdict in favor of the plaintiff in the sum of \$750.00. The court entered judgment on this verdict and the case is brought to this court on appeal for review. The plaintiff offered his policy of insurance, and evidence to the effect that his automobile was destroyed by fire on July 26th, 1933; also evidence to establish the value of his car at the time it was destroyed by the fire. The only evidence offered by the defendant was one witness by the name of Johnson, for the purpose of establishing the value of the car, and another witness named Leuth, who testified to repairs made on the plaintiff's car in June, 1933.

The appellant has assigned numerous errors for reversal of

IN THE DISTRICT COURT OF CLERK

STATE OF TEXAS

1900-1901

State of Texas,
County of [blank]
[blank]

That I, [blank],
[blank],
[blank],
[blank],
[blank]

WITNESSETH

That I, [blank],

do hereby certify that the foregoing is a true and correct copy of the original as the same appears in the records of the County Clerk of this County.

Witness my hand and seal of office this [blank] day of [blank] 1900.

Notary Public for the State of Texas.

My commission expires on the [blank] day of [blank] 1900.

Attest my hand and seal of office this [blank] day of [blank] 1900.

Notary Public for the State of Texas.

My commission expires on the [blank] day of [blank] 1900.

Attest my hand and seal of office this [blank] day of [blank] 1900.

Notary Public for the State of Texas.

My commission expires on the [blank] day of [blank] 1900.

Attest my hand and seal of office this [blank] day of [blank] 1900.

Notary Public for the State of Texas.

My commission expires on the [blank] day of [blank] 1900.

Attest my hand and seal of office this [blank] day of [blank] 1900.

Notary Public for the State of Texas.

My commission expires on the [blank] day of [blank] 1900.

Attest my hand and seal of office this [blank] day of [blank] 1900.

Notary Public for the State of Texas.

My commission expires on the [blank] day of [blank] 1900.

Attest my hand and seal of office this [blank] day of [blank] 1900.

the judgment, but the only ones argued in his printed brief are: That the court should have granted defendant's motion for an instructed verdict at the close of the plaintiff's evidence, and at the close of all the evidence, because there is a variance between the allegations of the declaration and the proof; and also, that the court did not properly instruct the jury as to the law in the case, and the court admitted improper evidence over the objection of the defendant, especially that plaintiff's exhibit #6 was inadmissible, and it was error to admit it over the objection of the defendant. At the close of the plaintiff's case the defendant made the following motion: "Now comes the defendant by Gower, Gray & Gower at the close of all the evidence for plaintiff and moves the court to exclude from the jury all the evidence offered and received on the part and on behalf of said plaintiff, and instruct the jury to find the issues for the defendant, and the defendant herewith submits separate instructions for that purpose." The motion that the defendant made at the close of all the evidence is as follows: 'Motion by defendant at the close of all the evidence to exclude all of the evidence and to instruct the jury to find the issues for the defendant.' It will be observed from an examination of each of these motions that no specific ground is pointed out why the court should instruct the jury to find for the defendant. Our courts have held that variance between the proof and the allegations of the declaration must be specifically pointed out to the court, either in a motion to direct a verdict, or it should be made at the time the evidence is offered; otherwise the objection is waived.

In the case of the L. S. & M. RR. CO., vs. Ward, 135 Ill., 511, on page 516, our Supreme Court in discussing how a variance between the proof and the declaration should be raised use the following language: "At the close of the evidence the defendant's

counsel asked the court to instruct the jury to find a verdict for the defendant on the ground that there was no negligence on the part of the defendant; and the accident occurred through the negligence of the plaintiff," and "the proof varies from the declaration."

"This was the only attempt to point out a variance, and it is clearly insufficient. It is incumbent upon the defendant to indicate and point out in what the variance consisted, so as to enable the court to pass upon the question intelligently, and also to enable the plaintiff to so amend her pleading as to make it conform to the evidence, and thus avoid defeat upon a point in no way involving the merits of her claim. Under our statute the amendment might have been instantly made, subject only to the terms *as* the court might have seen fit to impose, and the *case* might have proceeded as though no variance had ever existed." - *St. Clair County Benevolent Society v. Pietsen*, 94 Ill., 474." In the case of *Chicago City Ry. Co., v. McClain*, 211 Ill., on page 593, the court uses the following language: "We think the facts and circumstances which the evidence tended to establish are in substantial accord with the averments of the declaration; but, if it were otherwise, the contention of variance comes now too late. The case appears to have been tried upon its merits. No specific objection appears to have been made in regard to a variance between the evidence and the declaration during the trial, or a verdict asked for appellant upon that ground. In *West Chicago Street Ry. Co., v. Martin*, 154 Ill., 523, an objection was urged to a certain instruction on the ground of variance, and it was there said (page 531): "The objection to the instruction amounts to a claim of variance. The defect was curable, and had the plaintiff's attention been called to the matter by a specific objection or exception, he could have readily amended one of the counts of his declaration by striking out the special matter

alleged therein. The appellant, not having afforded him an opportunity to do this, must be considered as having waived the objection that it now seeks to avail of." And, in the City of Joliet v. Johnson, 177 Ill., 178, it is said, (Page 181): "It is well settled that an objection alleging variance between the allegations and the proofs must be made in the trial court, in order to afford an opportunity to the plaintiff to amend the declaration. Such objection should properly be made at the time the evidence is offered, otherwise it will be waived." There are numerous decisions, both by our Supreme Court and Appellate Courts that adhere to this same doctrine.

The appellant also contends that the court erred in admitting in evidence plaintiff's exhibit #6, which is a proof of loss and a report of the accident to plaintiff's car, for the reason that there was a variance between this exhibit and the declaration. An examination of the record discloses that the defendant did not object to the admission of this exhibit on the ground of variance, but "for the reason that it was not signed", and, "if the purpose of it is to comply with the policy, we think it clearly open to objection, because it does not purport to be the statement of the assured, but merely a communication between the company and its agent. (It is) Objected to on immateriality; (and it has) no bearing on the case at all." As we have stated, if the defendant wished to raise the objection of variance between the declaration and the proof, he should have made that objection specifically so that the plaintiff could have amended his declaration to comply with the proof. It is our opinion that the court did not err in admitting exhibit #6, nor in denying the defendant's motion for a directed verdict, for the point relied upon has been waived.

An objection has been made in regard to the given instruction by the court, and the refusal to give certain instructions as offered

by the defendant. We find no error in the instructions as given by the court to the jury. The appellant does not contend that the verdict is excessive. We do not see how the jury could have found any other verdict except for the plaintiff, and any error that the trial court may have committed in refusing to give the instructions as offered, or suggested, by the appellant is harmless and would have no bearing upon the merits of the case. The judgment of the County Court of Kankakee County should be, and is, hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

} ss.

SECOND DISTRICT

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8834

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 629³

BE IT REMEMBERED, that afterwards, to-wit: On
NOV 30 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A.D. 1934

James T. Rogers,

(Plaintiff) Appellee,

vs.

Appeal from the Circuit Court

of Stark County

Blanche L. Leitch,

(Defendant), Appellant.

WOLFE - P.J.

This case was before this court at the October Term, 1933, Gen. No. 8705, at which time the case was reversed and remanded. After the case was remanded to the trial court the plaintiff amended his declaration by striking out the major part of the original declaration. The declaration now stands as a suit on three promissory notes with an affidavit of merits attached. To this declaration the defendant filed the same pleas as were filed to the original declaration. To the pleas of the defendant, the plaintiff filed replications. The case was tried before the court without a jury, who found the issues in favor of the plaintiff and assessed the damages at \$4509.25. To review the correctness of the judgment, the defendant brings the case to this court for review by appeal.

The facts involved in this case are fully set forth in our former opinion and we will not again attempt to review the facts. It seems that the only question involved in this case is, whether the plaintiff, James T. Rogers, accepted H. G. Craig as a debtor and released Blanche L. Leitch, the appellant, from the liability on the notes that she signed. There is no dispute but that the notations printed on the back of the notes were placed there by Arthur J. Walters, cashier of the Scott, Walters & Wakestraw Bank,

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

DOCTRINE OF THE

without notice, knowledge or consent of the appellee, James T. Rogers. Walters had no right or authority to place these notations on the notes and any presumption that they were placed there with the consent of Rogers as a part of the transaction disappears entirely when evidence was introduced to the contrary. *Lohr v. Barkman*, 335 Ill. 333.

After a careful review of the abstract we are unable to find any evidence to support any claim of novation entering into the transactions between the parties, but, on the contrary the proof demonstrates to us that there is no such novation. We find nothing in the record to defeat the appellee's right to the judgment secured, and are of the opinion that the case should be, and is hereby affirmed.

Judgment affirmed.

...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...

...the ... of the ...

...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...
...the ... of the ...

...the ... of the ...

...the ... of the ...

STATE OF ILLINOIS.

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8712
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 629⁴

BE IT REMEMBERED, that afterwards, to-wit: On

DEC 22 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

February Term, A.D. 1934

Phenie Search Vogel,

appellee,

vs.

The Peoria Creamery Company,

appellant,

Appeal from the Circuit Court
of Peoria County

DOVE, J.

Appellee, Phenie Search Vogel, while riding as a guest in an automobile driven by her son, sustained injuries on June 9, 1930, as a result of an accident occurring on State Highway No. 8 near El Paso, Illinois.

The suit was instituted on March 4, 1932, against the Peoria Cartage Company and the Peoria Creamery Company, the declaration charging general negligence on the part of both defendants. Both defendants filed a plea of the general issue and the Cartage Company a special plea denying that it owned or controlled the truck referred to in the declaration as the truck of the Cartage Company. Upon these pleas, issues were joined, the cause submitted to a jury and a verdict returned, finding the appellant, Peoria Creamery Company, guilty, and assessing plaintiff's damages at \$7,000.00. The jury found the Peoria Cartage Company not guilty. Upon this verdict, after overruling a motion for a new trial, judgment was rendered and the record is brought to this court for review by appeal by the Peoria Creamery Company.

The evidence disclosed that the accident occurred about 8:00 o'clock on the evening of June 9, 1930, about two and one-half miles west of El Paso, and between ten and eleven miles east of

In the Appellate Court at Chicago

Second District

February Term, A.D. 1900

Phenie Green Young,

Appellee,

vs.

The Georgia Grocery Company,

Appellant,

DOY, J.

Appellee, Phenie Green Young, while driving on a street in an automobile driven by her son, was killed on June 2, 1900, as a result of an accident occurring on West Adams St. near 11 East, Chicago.

The suit was instituted on March 7, 1900, against the

Georgia Grocery Company and the Georgia Grocery Company, the defendant, operation of which, several registered on the part of both defendants.

Both defendants filed a plea of the general issue and the Georgia

Company a special plea denying that it had any interest in the automobile. The Georgia Grocery Company returned to its full answer to the plea of the Georgia Company.

Upon these facts, finding very clear, the court found in favor of the Georgia Grocery Company and a verdict returned, finding the Georgia Grocery Company liable for the death of Phenie Green Young.

Verdict, guilty, and assessment of damages to the Georgia Grocery Company, \$10,000. The Georgia Grocery Company and Phenie Green Young were both parties. The Georgia Grocery Company was found liable for the death of Phenie Green Young. The Georgia Grocery Company was found liable for the death of Phenie Green Young. The Georgia Grocery Company was found liable for the death of Phenie Green Young.

Georgia Grocery Company.

The verdict awarded that the Georgia Grocery Company pay to the Georgia Grocery Company \$10,000.

On the evening of June 2, 1900, about two and one-half

miles west of 11 East, and between two and three miles east of

Eureka. At the point of collision the road runs approximately straight east and west and is comparatively level. Route No. 8 is a concrete slab highway eighteen feet wide, with a black line in the center, and the dirt shoulder on each side of the slab is between three and one-half and four and one-half feet in width. The pavement was dry, although it had rained earlier in the day. The sun set that evening at 7:29 o'clock. Richard Vogel is the son of the plaintiff, forty years of age, and he was driving the car, which was a five passenger Oakland sedan, at the time of the accident. In the car with him were appellee, his mother, and his cousin, Dr. Beulah R. H. Rhoden. Appellee and Dr. Rhoden sat in the rear seat, Dr. Rhoden sitting immediately back of the driver, and appellee sitting on her right. According to Richard Vogel's testimony, his car was in perfect condition mechanically and was travelling, according to his estimate, at about thirty miles per hour at the time of the collision. Appellant's truck was in charge of Eustace Hinderliter, who was unaccompanied on the evening in question. This truck was twenty-seven and one-half feet in length, nine and one-half feet high and seven feet wide, and had a gross weight of 23,350 pounds. Its lighting equipment consisted of two headlights and three green dome lights in front and three red dome lights in the rear and one red tail light on the frame. As the Creamery truck proceeded easterly on Route No. 8, a pin was sheared off from the distributor and the truck obliged to stop on the right side of the black line, the left side of the truck being two feet south of the black center line in the pavement. It was about 7:30 P. M. when this break in the machinery of appellant's truck made it impossible to proceed further and Mr. Hinderliter, leaving the truck unattended, went to the home of Ivan Snow, a distance of five or six hundred feet, and called by phone John Sadler, a mechanic living at El Paso, who

arrived at the place where the truck was parked about fifteen minutes thereafter. Upon the arrival of Sadler in his service truck, he suggested that they had better tow the truck into El Paso, because if they found the gear in the bottom of the distributor broken, they would have to get a new one, but Hinderliter replied that it would be better to take the distributor off and ascertain the nature of the trouble and they would then determine what to do. The distributor was then taken off and it was ascertained what the trouble was, and the distributor was removed and taken to the work shop near Snow's residence by Hinderliter and Sadler and the appellant's truck remained on the pavement unattended, and it was while they were at the Snow work shop repairing the distributor that the truck, designated in this record as the Peoria Cartage truck, driven by Edward Bell, accompanied by John Butkovitz, approached from the west and stopped or was coming to a stop between thirty and fifty feet west of the Creamery truck, because of the approach of a car from the east. About the time the driver of the Cartage truck was bringing his car to a stop, the car in which appellee was riding was approaching from the west, going in an easterly direction. In attempting to pass the cartage truck, the driver of the Vogel car passed over the center line into the north traffic lane, and as he did so, he observed the car, which afterward proved to be one driven by George Troye, approaching from the east, and in order to avoid a head-on collision with this car, he turned his car back into the south traffic lane, and in so doing, the center of his car came in contact with the left rear corner of the Cartage truck, and as a result thereof, appellee received the injuries to recover for which this suit was instituted.

As grounds for reversal, it is insisted by appellant, first, that the evidence does not disclose that it was guilty of any

arrived at the place where the truck was parked about fifteen minutes
thereafter. Upon the arrival of Baker in his motor truck, he
stated that they had better get the truck out of there, because it
they found the seat in the bottom of the Chevrolet broken, and
would have to get a new one, but immediately realized that it would
be better to take the distributor off and transport it in some of
the trouble and that they should return to the garage.
for was then taken off, and it was stated that the trouble was
and the distributor was removed and taken to the garage where
Baker's residence by Hineshimer and another and the distributor
truck remained on the garage premises, and it was stated that
were it the truck was being repaired, it was stated that the
designated as this room, and it was stated that the
Baker's cell, accompanied by John Hineshimer, and that the
west end of the building, and it was stated that the
left side of the building, and it was stated that the
from the building, and it was stated that the
bringing him and he was able, and it was stated that the
was approaching from the rear, and it was stated that the
attention to have the engine turned, and it was stated that the
passed over and under the truck, and it was stated that the
did so, and observed the car, and it was stated that the
by John Hineshimer, and it was stated that the
a head-on collision with the car, and it was stated that the
some traffic law, and it was stated that the
contact with the left rear corner of the engine, and it was
result thereof, and it was stated that the
which this was indicated.
it was stated that the car, it is stated by Hineshimer, that
that the evidence does not indicate that it was other of the

negligence; second, that the appellee is guilty of contributory negligence; third, that the presence of the Cartage Company truck was an intervening cause which broke the causal connection between the original wrong of the appellant, if any, and the resulting injury; fourth, that the motion for a new trial should have been allowed because of newly discovered evidence, that improper evidence was admitted upon the trial and that some of the given instructions were erroneous.

Dr. Beulah R. H. Rhoden, who was sitting in the rear seat of the Vogel car with appellee, at the time of the collision, also received injuries to recover for which she instituted suit in the Circuit Court of Peoria County against both the Peoria Creamery Company and the Peoria Cartage Company, which resulted in a judgment and in her favor/against both defendants. From that judgment the Peoria Creamery Company prosecuted a writ of error to this court, being General Number 8750, and the Peoria Cartage Company brought the record to this court for review by appeal, being General Number 8754. Opinions in these cases are filed this day, and it is therefore not necessary for us to repeat what we said in those opinions.

In the Rhoden case, we stated that the question of negligence on the part of the servant in whose charge the Creamery truck had been placed and whether such negligence was the proximate cause of the collision or whether the presence of the Cartage truck was an independent intervening cause were all questions of fact for the jury to determine, and we there held that the trial court was warranted, under the evidence, in submitting those questions to the jury and the jury were, from all the facts and circumstances in evidence, warranted in finding that the causal connection, between the conduct of the servant of the Creamery Company and the collision, was unbroken by any intervening cause, and that the proximate cause

of the injuries which Dr. Rhoden sustained was the negligence of the appellant here. Under the evidence in this record we have arrived at the same conclusion, and in our opinion the jury were warranted, under the facts and circumstances in evidence, as disclosed by this record, in finding that the injuries which appellee sustained were due to the negligence of appellant, that the presence of the Cartage Company truck was not an independent intervening cause which broke the causal connection between this negligence and the injuries which appellee suffered and that appellant's negligence was the proximate cause of the collision.

Appellant insists that appellee was guilty of such contributory negligence as to bar a recovery. In their argument, they state that the evidence discloses that appellee, although possessed of good eyesight, and looking at the pavement in front of the car in which she was riding, did not observe the truck into which the Vogel car collided until she was within twenty or twenty-five feet from it, and did not say anything or make any objection or remonstrance of any kind to her son with reference to what he should do or not do while they were traveling the eleven miles preceding the collision. According to her testimony, the car was proceeding in the neighborhood of thirty miles per hour during these last eleven miles, and according to the evidence of the driver of the car, the headlights had been ~~dimmed~~ so that twenty or twenty-five feet ahead was as far as anyone of those in the car could see. Appellee, at the time of the accident, was an elderly lady, seventy-two years of age. She was the mother of the driver of the car, and while it is true that where a guest has reason to apprehend danger, she has no right, simply because someone else is driving the car, to omit reasonable and prudent efforts to avoid the danger, still the law only required her to exercise such care as the exigencies of the situation required. The fact that appellee did not do or say anything as the

of the nature which Mr. Johnson mentioned was the defendant in the
appealant here. When the witness in this case was asked
at the time mentioned, and in the presence of the jury, whether
under the facts and circumstances in evidence, he believed by a
record, in this case, that the defendant was guilty of the crime
due to the nature of the evidence, that the evidence of the
Company truck was of an independent investigation of the
the central connection between the defendant and the company which
appealant shifted the burden of proof to the defendant and the
cause of the accident.

Appellant insists that appealant was guilty of such conduct
and negligence as to be a recovery. In this regard, that there
that the evidence disclosed that appealant, although defendant of the
evidence, and looking at the evidence in light of the fact in which
she was riding, did not observe the truck which was in the
road until she was within twenty feet of the truck from the
and did not say anything or make any objection or comment
any kind to her son with reference to what he was doing or not do
while they were traveling the same which constituted the violation.
According to her testimony, the fact was occurring in the
road of thirty miles per hour which was a violation of the
according to the evidence of the witness in this case, and
had been damaged to that extent by the truck which was in the
as anyone of course in the same road.
The accident, and as already stated, occurred in the
was the nature of the accident, and the fact is that
there is great evidence of evidence which, and the fact is
slightly because defendant was in the road, and the fact is
and placed efforts to avoid the accident, and the fact is that
her to exercise such care as was required of the driver to
proved. The fact that appealant did not do or was negligent on the

car approached the truck, did not, in our opinion, show, as a matter of law, that she was not in the exercise of ordinary care for her own safety.

In *Christensen v. Johnston*, 207 Ill. App. 209, the court quoted with approval the following language from *Clarke v. Connecticut Co.*, 83 Conn. 219: "What conduct on the passenger's part is necessary to comply with his duty must depend upon all the circumstances, one of which is that he is merely a passenger having no control over the management of the vehicle in which he is being transported. Manifestly the conduct which reasonable care requires of such a passenger will not ordinarily, if in any case, be the same as that which it would require of the driver. While the standard of duty is the same, the conduct required to fulfil that duty is ordinarily different because their circumstances are different". The question whether appellee did or failed to do all that a reasonable person in like circumstances would have done was properly submitted to the jury by the trial court. *Waitrovich v. Black*, 254 Ill. App. 49; *St. Clair Nat. B'k. v. Monaghan*, 256 Ill. App. 471.

One of the reasons why appellant insists its motion for a new trial should have been granted was that upon another hearing it would be able to produce as a witness George Troye. This case was tried in April 1933 and on June 7, 1933 appellant located Troye and procured his affidavit. As disclosed by this affidavit, Troye was driving west from El Paso to Peoria on Route No. 8 on the evening in question, and he first observed the Vogel car as he, Troye, approached appellant's truck and when the Vogel car was about one-half mile west of appellant's truck; that Troye was travelling about forty miles per hour and the Vogel car was travelling at least fifty miles per hour and continued at that same rate of speed as long as he could observe it; that when the Vogel car collided with the

truck, Troye was immediately north of the Vogel car and he drove his car off the pavement, into a ditch and then back upon the pavement.

If Troye had been present and testified, as disclosed by his affidavit, his evidence would have been cumulative only, and it was not of such a controlling and conclusive character that if the case was retried his evidence would change the result. The Rhoden case was tried subsequently to the time this case was heard. Troye testified in that case and the jury found a verdict against both defendants. There was no error in overruling appellant's motion for a new trial on the ground of newly discovered evidence.

During the progress of the trial, Everett Bell, the driver of the truck spoken of in this record as the Cartage Company truck, was called as a witness and examined by counsel representing the Cartage Company. Upon cross examination, he testified that the first time he talked to any one about the case was to Mrs. Joosten, whose husband took appellee and Dr. Rhoden to the hospital; that he had not talked to any one about the case before that time. Counsel then asked him; "Did you make any report after this accident?" and the witness answered in the affirmative. He was then asked: "To whom?" and he replied: "To the insurance man". At the conclusion of the cross-examination of this witness, counsel inquired of the witness whether he reported the fact that Mr. Joosten had taken appellee to the hospital immediately after the accident and he answered that he had and was asked to whom and he said: "When I made out my report". He was then asked: "Who did you give that name to - - that report?". The question was objected to by Mr. Elliott, counsel representing the Cartage Company. The objection was overruled and the witness answered: "The insurance man". Upon motion of Mr. Elliott, the answer was stricken and the court instructed the jury to disregard the answer. After the witness had concluded his testimony, Mr. Elliott moved the court to withdraw a juror and continue

tried, they are immediately aware of the fact that they are not
out of the question, that a trial will take place and the
it was not, was present and testified, as directed by the
attorney, his answers would have been such as to show that
was not of such a character as to constitute a violation of the
case was tried the evidence would show the result. The witness
case was tried and possibly to the fact that the witness
testified in that case and the jury found a verdict against the
defendants. There was no error in the trial and the witness
for a new trial on the ground of newly discovered evidence.
During the progress of the trial, several calls, the witness
of the witness of in that room in the first morning trial,
was called as a witness and examined by counsel and the
testimony. Upon cross-examination, he testified that the
first time he talked to any one about the case was to Mr. Johnson,
whose name he had forgotten and Mr. Johnson to the hospital; that he
had not talked to any one about the case before that time. Johnson
then asked him: "Did you make any report about this case?"
and the witness answered in the affirmative. He was then asked:
"To whom?" and he replied: "To the hospital." If the conclusion
of the cross-examination of this witness, counsel learned of the
witness whether he reported the fact that he had been in the
applied to the hospital immediately after the accident and he
answered that he had and was asked to whom he said: "I went
out by myself." He was then asked: "Did you give any report about
that report?" The witness was asked to go on. (Exhibit 1, page 10)
Regarding the witness Johnson, the objection was overruled and
the witness answered: "The hospital was the first place I went
to after the accident and the report mentioned the fact
to someone at the hospital. After the witness had testified his last
word, Mr. Elliott would not come to the stand to testify

the case, and counsel for appellant stated that he joined in the motion which was denied by the trial court.

It will be observed that no objection or motion to strike this evidence was made by counsel for appellant, but only by counsel for the Cartage Company and the jury found the Cartage Company not guilty. Furthermore Bell was an employee of the Cartage Company truck and the report he made was made by him as a servant of that company and not appellant. The inquiry was a legitimate one, as one of the issues upon the trial was whether Bell was an employee or servant of the Cartage Company or John Svob, whom the Cartage Company contended owned the truck and an inquiry whether Bell reported the accident to Svob or the officers of the Cartage Company was proper.

The three instructions complained of are instructions Nos. 8, 9 and 10. Instruction No. 8 is as follows: "The Court instructs the jury that on June 9, 1930 the Statute of the State of Illinois provided as follows: 'No driver of a vehicle shall suddenly stop, slow down or attempt to turn around without first signalling his intentions with outstretched arm or otherwise to those following closely in the rear.'" Appellant's criticism is that it was not applicable to the case and the jury was misled thereby. This instruction could only have been understood by the jury as applying to the driver of the Cartage Company truck, and inasmuch as the jury found the Cartage Company not guilty, appellant was not injured or its cause prejudiced by the giving of this instruction, and in our opinion the jury could not have been misled thereby.

Instruction No. 9 is as follows, viz: "The court instructs the jury that on June 9, 1930 the Statutes of the State of Illinois provided as follows: 'No driver of a vehicle shall stop the same on any durable hard-surfaced State Highway or allow it to stand in such position that there is not ample room for two vehicles to pass upon

the fact, the Council has decided to suspend the
which was decided by the Council.

It will be decided that no objection to action is taken.

This action was made in Council on 10/10/1910, and will be decided.

For the Council's decision, the Council has decided to suspend the

policy. The Council will not be responsible for the Council's decision.

and the Council has decided to suspend the Council's decision.

and not decided. The Council was a decision on 10/10/1910, and will be

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

very concerned about the Council's decision, and the Council has decided

the Council has decided to suspend the Council's decision.

proper.

The Council has decided to suspend the Council's decision.

2, 3 and 4. The Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

provided in the Council's decision, and the Council has decided

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the Council has decided to suspend the Council's decision.

the road, nor shall any person unload his cargo or transfer it from one vehicle to another, except in case of emergency, upon such highway'." The phrase, "nor shall any person unload his cargo or transfer it from one vehicle to another", has no application to the facts in this particular case and should have been eliminated. This instruction, however, is in the language of the Statute, and it was not improper to give it. *Liedeck v. City of Chicago*, 248 Ill. App. 545. The further criticism is made that by it the jury were led to believe that if appellant's truck did stop and stand on the pavement, that act constituted negligence. Instruction No. 44, given at the request of appellant, told the jury that if they found, from the evidence, that the mechanism of the truck of appellant broke under circumstances making it necessary for the driver of the truck to stop the truck on the concrete slab, it was not illegal for the driver to so stop the truck and that under such circumstances such act of stopping on the slab did not constitute an act of negligence on the part of the driver of the truck or of appellant. There was also given, at the request of appellant, this further instruction, viz: "The jury are instructed that under the evidence in this case, the driver of the truck of the Peoria Creamery Company had to meet an emergency with said truck of the Peoria Creamery Company, and by reason of such emergency, said truck of the Peoria Creamery Company was forced to come to a stop, and you are instructed as a matter of law that under the statute of the State of Illinois, said truck had the right to come to a stop on the south side of the concrete portion of the hard road because of such emergency, and if you find from the evidence that the driver of said truck of the Peoria Creamery Company left said truck on said south side of the concrete portion of said hard road for a reasonable period of time, properly lighted, if you find under the evidence that lights were necessary, for the purpose of

repairing a defect in the mechanism of said truck, then under such state of the proof, you should find the defendant, Peoria Creamery Company, not guilty."

These instructions taken together presented appellant's theory of its defense and the instruction complained of could not have misled the jury.

Instruction No. 10 told the jury that on June 9, 1930, the Statute of this state provided as follows: "On approaching another vehicle proceeding in an opposite direction and when within not less than two hundred and fifty feet of the same, any person in charge of a motor bicycle or motor vehicle equipped with electric headlight or headlights, shall dim, drop or extinguish such headlight or headlights". The criticism of this instruction is that there was no evidence upon which it could be based, and that it tended to mislead the jury into concluding that if the driver of the car in which appellee was riding dimmed the lights or was riding with dim lights, appellee was in the exercise of due care and entitled to recover. There is no merit to these criticisms. Richard Vogel's testimony was that after leaving Eureka, he had his bright lights on, except when he met traffic coming from the opposite direction, and at those times he dimmed his lights and that the last car which passed him going in a westerly direction was only a matter of seconds before the collision, and at the time of the collision he had his dim lights on. Appellant's given instruction No. 39 is as follows: "The jury are instructed that the plaintiff is not entitled to a recovery unless she herself was free from contributory negligence, and as to this freedom from contributory negligence, the plaintiff has the burden of proof. If you find from the evidence that the car in which the plaintiff was riding was being driven at a speed greater than would have been used by a reasonably prudent person in view of

regarding a defect in the mechanism of the pump, the pump was
state of the pump, you think that the pump is defective?
Company, not guilty.
These instructions from the court are given to you
at its office and the instructions are given to you in the
led the jury.
Information of the fact that the pump was defective, the
of the fact that the pump was defective, the pump was defective
which proceeded in the pump is defective, the pump is defective
loss when two engines and the pump is defective, the pump is
change of a motor system of engine which is defective, the pump is
health is on the pump, the pump is defective, the pump is defective
or defective. The fact is that the pump is defective, the pump is
no evidence upon which it seems to be, and that it is defective
mistake the fact into evidence, if the fact is defective, the fact is
which engine is defective, the fact is defective, the fact is defective
fact, the fact is in the fact of the fact, the fact is defective
recovery. There is no fact in the fact, the fact is defective
the fact is in the fact, the fact is defective, the fact is defective
on, the fact is defective, the fact is defective, the fact is defective
and the fact is defective, the fact is defective, the fact is defective
passed the fact is in the fact, the fact is defective, the fact is defective
before the fact, the fact is defective, the fact is defective, the fact is defective
dim it is in the fact, the fact is defective, the fact is defective, the fact is defective
the fact is defective, the fact is defective, the fact is defective, the fact is defective
the fact is defective, the fact is defective, the fact is defective, the fact is defective
and the fact is defective, the fact is defective, the fact is defective, the fact is defective
has the fact of the fact. If the fact is defective, the fact is defective, the fact is defective
is which the fact is defective, the fact is defective, the fact is defective, the fact is defective
then would have been the fact is defective, the fact is defective, the fact is defective, the fact is defective

the condition of visibility, the condition of the headlights, the condition of the highway, and all other surrounding circumstances, and if you further find that such speed, under the circumstances, was a proximate cause of the accident in question, and if you further find from the evidence that the plaintiff knew of the speed of said automobile, and knew of the condition of the lights, and knew of the condition of visibility, and other surrounding circumstances, and that she made no objection of any kind as to the manner in which said automobile was being operated, then, in such event, the plaintiff was guilty of contributory negligence, and you should find the defendants not guilty". And appellant's given instruction No. 40 is as follows: "The jury are instructed that when any automobile is proceeding upon any public highway in this state during the period from one hour after sunset to sunrise, it shall carry two lighted headlights, visible at least two hundred feet in the direction toward which such automobile is proceeding; and if you believe from the evidence that the lights on the automobile in which plaintiff was riding were such that they would not show in the direction toward which it was traveling at least two hundred feet, as provided by statute, and you further believe from the evidence that said automobile was being driven at a speed greater than would have been used by a reasonably prudent man in view of the condition of said lights and all other surrounding circumstances at the time of the accident in question, and if you further believe from the evidence that such operation of said automobile in which the plaintiff was riding was a proximate cause of the accident in question, and if you further find from the evidence that the plaintiff saw the condition of such lights and knew of said manner in which said automobile was being operated, and you further find that the plaintiff made no objection of any kind as to the manner in which said automobile was being operated, then, in such event, the plaintiff was guilty of contributory negligence, and you should find the defendants not

guilty." There was evidence in the record which warranted the court in giving instruction No. 10, and when read in connection with these instructions given at the request of appellant, the criticisms thereto are untenable.

We have read this record with care. Appellee suffered severe injuries, and it is not contended that the damages awarded are excessive. The errors relied upon for reversal are largely questions of fact, and the findings of the jury are sustained, in our opinion, by the evidence. There are no reversible errors in the record and the judgment is therefore affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8154
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 629⁵

BE IT REMEMBERED, that afterwards, to-wit: On

DEC 22 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1934

Beulah R. H. Rhoden,

appellee,

vs.

Peoria Cartage Company,

appellant.

Appeal from the Circuit Court

of Peoria County

DOVE, J.

Appellee, Beulah R. H. Rhoden, while riding as a guest in the automobile of her cousin, Richard Vogel, was injured on June 9, 1930, as a result of the car in which she was riding and which was being driven by Vogel running into the corner of a truck on State Highway number eight near El Paso, Illinois. She recovered a judgment in the Circuit Court of Peoria County for \$20,000.00 against the Peoria Creamery Company and the Peoria Cartage Company, and from that judgment, appellant, the Peoria Cartage Company, has perfected this appeal and brings the record to this court for review.

The Peoria Creamery Company prosecuted a writ of error to this court, being general number 8750, and an opinion in that case is this day filed, which reverses the judgment of the trial court and remands the cause for another trial, because, in our opinion, the verdict against appellant here was manifestly against the weight of the evidence. While it is therefore unnecessary for us to re-iterate what was said in the opinion filed in General Number 8750, there is one contention advanced by appellant herein which was not called to our attention by plaintiff in error in that case, and no errors were assigned therein by this appellant.

Appellant here insists that it was not the owner of the truck into which the Vogel car collided; that John Svob owned it and it was, at the time of the collision, operated by his servants, over

In the Supreme Court of Illinois

Second District

May Term, A. D. 1934

Benjamin W. H. Haden,

Appellee,

vs.

Florida Garage Company,

Appellant.

NOV. 7.

Appellee, Benjamin W. H. Haden, while driving and seated in the

automobile of her cousin, a white coupe, was injured on April 2,

1930, as a result of the car in which he was riding and which was

being driven by Roger Manning into the corner of a block on State

highway number eight near Elmhurst, Illinois. The respondent's 1929-

model in the Circuit Court of Cook County for \$20,000.00 (Twenty

the Florida Garage Company and the Florida Garage Company, and that

that judgment, appellee, the Florida Garage Company, was rendered

this appeal and assigns the errors to which shall be referred.

The Florida Garage Company is a corporation organized under the

laws of this State, having its principal office at Chicago, Illinois,

is this day filed, which reviews the judgment of the Circuit Court

and remands the cause for another trial, to-wit: to the Circuit Court

the verdict against appellee was manifestly wrong and the error

of the evidence. While it is true that the respondent's car was

involved in the collision and that the respondent's car was

there is one contention advanced by appellee, to-wit: that the

called to our attention by plaintiff is never in fact true, and

no errors have been assigned herein by the respondent.

Appellant here insists that it was not the owner of the car

into which the respondent's car collided; that John Lee was in the

car, at the time of the collision, operated by his servants, and

appeal from the Circuit Court

of Cook County

whom appellant had no control; that Svob was an independent contractor, and it was therefore incumbent upon the trial court, at the conclusion of the evidence, to grant appellant's motion for an instructed verdict.

The evidence discloses that some time before the accident, Svob bought this truck, obtained a license in his own name, paying the fee therefor and entered into an oral contract with appellant by the terms of which appellant, a common carrier of freight for hire, was to solicit freight and merchandise for transportation, make the necessary arrangements therefor and maintain terminals at Peoria and Chicago, from which the freight would be loaded and unloaded. At these terminals, its employees directed the loading and unloading of the freight. Appellant kept all the records in connection therewith, issued way-bills in its name which designated the consignee and point of destination. Appellant advertised for freight in various newspapers, paid therefor, and collected the transportation charges, retaining thirty per cent thereof for its services and designated the regular trips which were made. John Svob hired the driver and employees for his truck, paid their wages and could discharge them at pleasure. He also paid the truck maintenance, together with the gas bills, oil, storage and tires. Upon this trial Svob testified that he received seventy per cent of the gross revenue derived from all freight which his truck hauled, but upon another trial, in which Mrs. Vogel was the plaintiff and which involved this same collision, he testified that appellant received thirty per cent and he seventy per cent of the net profits. It further appeared from the evidence that as soon as Svob became the owner of the truck, it was placed in use by appellant, along with other trucks, in the transportation of freight, appellant having painted thereon, "Peoria Cartage Company, No. 18, Long Distance Hauling, Peoria, Chicago, Springfield,

from applicant has no effect; that they are in possession of
fracture, and it is not necessary to show that they are
the conclusion of the evidence, but they are not, in fact, the
of fractured material.

The evidence indicates that some time before the accident,
even though this is not, however, a fact in itself, but
it is not the fact that it is not a fact in itself, but

applicant by the fact of this evidence, it is not a fact in
fact for him, but it is not a fact in itself, but it is not
position, and the necessary evidence is not in fact, but it is
fracture of the fact, and it is not a fact in itself, but it is
lost and undisturbed. It is not a fact in itself, but it is
the fact of the fact, and it is not a fact in itself, but it is

records in connection with the fact, and it is not a fact in
which fact, and it is not a fact in itself, but it is not a fact in

fracture of the fact, and it is not a fact in itself, but it is not a fact in
collected the fact, and it is not a fact in itself, but it is not a fact in
there, for the fact, and it is not a fact in itself, but it is not a fact in
was not. It is not a fact in itself, but it is not a fact in

fact, and it is not a fact in itself, but it is not a fact in
with the fact, and it is not a fact in itself, but it is not a fact in
storage and fact. It is not a fact in itself, but it is not a fact in

collected the fact, and it is not a fact in itself, but it is not a fact in
fact, and it is not a fact in itself, but it is not a fact in

fact, and it is not a fact in itself, but it is not a fact in
he testified that he testified that he testified that he testified that he testified
fact, and it is not a fact in itself, but it is not a fact in

fact, and it is not a fact in itself, but it is not a fact in
in fact, and it is not a fact in itself, but it is not a fact in
of fact, and it is not a fact in itself, but it is not a fact in
fact, and it is not a fact in itself, but it is not a fact in

Bonded and Insured". In smaller letters there also appeared thereon Mr. Svob's name.

In Shannon v. Nightingale, 321 Ill. 168, it appeared that the plaintiff was injured by a truck belonging to Rose Loux, which was driven by Dale Pratt. At the time the injuries were sustained, Pratt was engaged in hauling gasoline and oil which belonged to Wm. R. Nightingale and John P. Pallissard, partners, doing business as the Eastern Illinois Oil Company. The plaintiff recovered a judgment in the circuit court against Nightingale and Pallissard, which this court affirmed, and in affirming that judgment, the Supreme Court said: "This record presents no question of law for our consideration except that raised by the motion to direct the verdict. The question arising on this motion is whether there is any evidence tending to sustain the plaintiff's side of the issue. The plea that Dale Pratt was not the servant of the defendants raised an issue of fact. * * * if the contract of the plaintiffs in error with Mrs. Loux had been in writing, the question whether, in performing the work of delivering gasoline and oil for the plaintiffs in error, she was an independent contractor would be determined, as a matter of law, by a construction of the written contract. Pioneer Construction Co. v. Hansen, 176 Ill. 100. Since the contract was not in writing but could be shown only by parol evidence, the determination of its terms was necessarily left to the jury,^{and} the question whether by its terms Mrs. Loux was an independent contractor or not was therefore required to be submitted to the jury under proper instructions by the court. Consolidated Fireworks Co. v. Koehl, 190 Ill. 145. The facts that the trucks all had the plaintiffs in error's firm name painted on them, that the drivers collected pay for the plaintiffs in error for the gasoline and oil which they delivered, that they took orders for

gasoline and oil to be delivered by plaintiffs in error, that they were under the control and direction of the plaintiffs in error as to when and where they should deliver gasoline and oil, all were circumstances tending to show that the drivers of the trucks were the employees of the plaintiffs in error. There were other circumstances tending to show that they were the employees of Mrs. Loux as an independent contractor. The determination of the question of ultimate fact whether or not Pratt was an employee of the plaintiffs in error involved a conclusion derived from a consideration of all these and other evidentiary facts, in connection with the application of principles of law to a consideration of the evidence. The question thus becomes a mixed question of law and fact, as to which the verdict of the jury and the decision of the Appellate Court are conclusive and not subject to review."

In *Hartley v. Red Ball Transit Co.*, 344 Ill. 534, the defendant there, as here, contended that it was not liable for the reason that the driver of the truck whose negligence caused the injuries complained of was not its servant or employee, but was an independent contractor and in support of that contention introduced a written contract between itself and Burke, the driver of the truck, evidencing the sale of the truck and equipment to Burke and an agreement to furnish him work, such work to consist of long distance hauling. The court held that although the contract between Burke and the defendant company was in writing, it was incomplete in itself, and for that reason the question whether or not Burke ~~was~~ was an agent or employee of defendant or an independent contractor was a mixed question of law and fact, and that the trial court very properly submitted the whole question as to what the contract was, to the jury under proper instructions.

In the instant case, the contract between appellant and

Svob was an oral one, and whether Svob was an independent contractor was a question of fact, and inasmuch as we have held that appellant's motion for a new trial should have been granted because the finding of the jury that appellant was guilty of negligence, is manifestly against the weight of the evidence, it is not necessary for us to determine whether its finding that Svob was not an independent contractor is also against the weight of the evidence. In addition to the evidence heretofore set out, there were other facts and circumstances in evidence from all of which we are clearly of the opinion that no error was committed by the trial court in refusing appellant's motion for an instructed verdict.

The court admitted, over appellant's objections, two photographs of appellee taken at the hospital a few days after the accident. These pictures showed the features of appellee before her wounds had healed and certain bandages, one bandage having been removed, so the evidence disclosed, for the purpose of the picture. While ordinarily the admission of such photographs is a discretionary matter with the trial court, we are inclined to the opinion that the effect of an examination of these pictures by the jury could not have been otherwise than prejudicial to the defendants and perhaps accounts, in a measure, for the exceedingly large verdict which was returned.

For the reason assigned in the opinion this day filed in the case of Rhoden v. Peoria Creamery Co., Gen. No. 8750, the judgment of the Circuit Court of Peoria County is reversed and the cause remanded.

REVERSED AND REMANDED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT.

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice. 277 I.A. C301

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
DEC 23 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1934

Alex Nicholson, et al,

appellants,

vs.

Appeal from the Circuit Court

Hugh R. McGuire, et al,

of Will County

appellees.

DOVE, J.

On April 17, 1928, Hugh R. McGuire, being the owner of Lot Eleven (11) in Block Twenty-three (23) in North Joliet, known as No. 502-504 Summit Street, executed a trust deed to the Commercial Trust and Savings Bank of Joliet, trustee, to secure the payment of twenty-two principal notes aggregating \$9,000.00. These notes were numbered one to twenty-two inclusive. Notes numbered one to eight inclusive were each for the principal sum of \$500.00. Notes numbered nine to twelve inclusive were each for the sum of \$1,000.00, and notes numbered thirteen to twenty-two inclusive were each for the sum of \$100.00. Each note was due five years after date and bore 6% interest, payable semi-annually. On April 6, 1929, McGuire executed another trust deed, in which he conveyed to William Gahagan, trustee, the south half of said Lot 11, to secure the payment of \$2600.00, and a few days later executed another trust deed in which he conveyed to William Gahagan, trustee, the north half of said Lot 11, to secure the payment of \$2200.00. Prior to April 18, 1929, McGuire had obtained a purchaser for the south half of Lot 11 for \$2000.00, and on that day he paid to the Commercial Trust and Savings Bank \$2,000.00, and received from it notes numbered 1, 2, 3, 17, 19, 20, 21 and 22, and a partial release, which released

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

IN RE: ESTATE OF JAMES EARL RAY, JR.

Debtor.

James Earl Ray, Jr., et al.,

Plaintiffs,

vs.

James Earl Ray, Jr., et al.,

Defendants.

Case No. 100-10000

100-10000

On April 10, 1968, James Earl Ray, Jr., was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

On April 10, 1968, James Earl Ray, Jr. was arrested at his home in

Memphis (TN) in connection with the assassination of Dr. Martin Luther King, Jr.

the south half of said Lot 11 from the operation of the trust deed of April 17, 1928.

On August 15, 1933 this proceeding was instituted to fore-close the trust deed of April 17, 1928. The bill was in the usual form, alleging, however, that the release by the trustee as to the south half of said Lot 11 was void and seeking a decree against all of Lot 11. Answers were filed, a hearing had and from a decree finding that the release was valid and effective and decreeing foreclosure and sale only of the north half of Lot 11, the complainants bring the record to this court for review by appeal.

The evidence discloses and the decree finds that the twenty-two notes which were secured by said trust deed were received by the Commercial Trust and Savings Bank at the time the loan was made and were sold to various persons at different times. For instance, Note No. 5 was sold to complainant Omi Hill on August 31, 1928, note No. 6 was sold to complainant Caroline Crespi on May 5, 1928, notes Nos. 10 and 11 were sold to complainant Alex Nicholson on May 4, 1928, note No. 12 was sold to Bertha Donnelly on May 5, 1928, note No. 13 was sold to Stephen Starmann on May 17, 1928, note No. 4 was sold to Benjamin Halper on August 24, 1928, note No. 6 was sold to complainant Fannie Jones on June 15, 1929, note No. 7 was sold to Sylvia Elwood on June 17, 1929, note No. 9 was sold to complainant Frances J. De Geus on June 17, 1929, note No. 14 was sold to Charlotte Naumann on September 10, 1929, note No. 15 was sold to complainant I. W. Zinser on January 21, 1930 and note No. 16 was sold to complainant Fred Efner on December 6, 1930. The evidence further discloses and the decree finds that at the time complainants purchased these notes from the bank that they were each advised that the trust deed was a lien on all of Lot 11.

The trust deed contained a provision that all of the principal

The south half of note 10 is from the bottom of the first set of April 17, 1932.

On August 12, 1932 this specimen was destroyed by some-

one else the first set of April 17, 1932. The only one in the form, although, however, that the entire set was destroyed in the south half of note 10 is the only one which is destroyed in the set of April 17, 1932.

It is interesting to note that the specimen which was destroyed in the south half of note 10 is the only one which is destroyed in the set of April 17, 1932.

The specimen which was destroyed in the set of April 17, 1932

two notes which were destroyed in the first set of April 17, 1932. The Committee, which was destroyed in the first set of April 17, 1932, and were sold to various persons in the first set of April 17, 1932. Note No. 1 was sold to the Committee in the first set of April 17, 1932.

Note No. 2 was sold to the Committee in the first set of April 17, 1932. Note No. 3 was sold to the Committee in the first set of April 17, 1932. Note No. 4 was sold to the Committee in the first set of April 17, 1932.

Note No. 5 was sold to the Committee in the first set of April 17, 1932. Note No. 6 was sold to the Committee in the first set of April 17, 1932. Note No. 7 was sold to the Committee in the first set of April 17, 1932.

Note No. 8 was sold to the Committee in the first set of April 17, 1932. Note No. 9 was sold to the Committee in the first set of April 17, 1932. Note No. 10 was sold to the Committee in the first set of April 17, 1932.

Note No. 11 was sold to the Committee in the first set of April 17, 1932. Note No. 12 was sold to the Committee in the first set of April 17, 1932.

Note No. 13 was sold to the Committee in the first set of April 17, 1932.

promissory notes were equally secured and that there should be no preference or priority between them and that when the notes and all expenses under the trust deed shall be fully paid, the grantee shall reconvey the premises to the grantors, but there was no provision therein authorizing the trustee to execute a partial release and the release of April 18, 1929 was made without the knowledge or consent of the complainants who are the holders of the notes not then paid.

The trustee, by the provisions of the trust deed, took title to the property therein described for the benefit of all the noteholders. Beyond the specific powers enumerated and those necessarily inferred therefrom, the trustee was powerless to act. "Where a mortgage security takes the form of a deed of trust, the legal title is vested in the trustee and he is therefore the proper person to execute a release. But his authority is limited to the terms of the deed and he cannot give a valid release without payment of the debt secured or other performance of the conditions of the trust or without the authority or consent of the beneficiary, although the latter, by his subsequent conduct may estop himself to repudiate the act of the trustee in giving a release originally unauthorized". 41 C. J. 802.

A trustee has the power, as to third parties, to release the lien created by the trust deed, even though he does so without the consent of the holder of the indebtedness which the trust deed was given to secure and in violation of the obligations of his trust, and even though the indebtedness secured by the trust deed is not due, but in equity, a release unauthorized by the terms of the trust deed or by the consent of the cestui que trust will have no effect upon the trust deed as between the original parties or as to subsequent purchasers with notice. *Vogal v. Troy*, 232 Ill. 481 at page 484. "The release by the mortgagee of a mortgage which he holds in trust for another before it becomes due is in contravention of his

trust, where by its terms it was to remain as security for the payment of money at specific times for a stated period, and such release constitutes no obstacle to enforcing such mortgage against subsequent bona fide purchasers. They are bound to know he had no authority to grant such release, for purchasers of land must be deemed to have examined every deed and instrument on record affecting their title, and to have notice of every fact disclosed by the record and every other fact which an inquiry suggested by these records would have led up to". 26 R. C. L. 1279.

The notes secured by this trust deed were not due, they were not in the hands of the trustee, but were held by various individuals. The execution of the partial release was not authorized by the instrument which defined the trustee's powers. To sustain the decree of the lower court would be to hold that one who executes a trust deed to secure the payment of his indebtedness may, long prior to the maturity of that indebtedness, pay to the trustee a portion of that indebtedness, and receive from the trustee a release of a portion of the property conveyed by the trust deed, there being no provision in the trust deed which authorized the execution of such partial release. If a court of equity would sanction this, what would prevent the grantor in the trust deed making a similar payment the following day and procure the release of the balance of the property covered by the trust deed? As stated in Mann v. Jummel, 183 Ill. 523, an unauthorized release will have no effect upon the deed of trust as between the original parties or as to subsequent purchasers with notice.

Appellees abandoned their case in this court, and under Rule 7, we would have been justified in reversing and remanding this decree pro forma, for failure of appellees to file briefs. From an examination of the record however, we deemed it proper to pass upon

the merits of the controversy. It appears from the evidence that Lot 11 is divisible, the north half being improved with a two story flat brick building and known as No. 504 Summit Street, and the south half is improved by a frame cottage. In the event of a sale, it would be eminently fair to all parties that the north half of Lot 11 be sold first and then the south half sold only in the event the proceeds of the sale of the north half are insufficient to satisfy the unpaid indebtedness and costs. Such a provision in the decree would be equitable, and is acceptable to appellants.

The decree of the lower court is reversed and this cause remanded, with directions to render a decree in accordance with the prayer of the bill, said decree to provide that in the event of a sale, that the north half of Lot 11 be first offered and the south half thereof only be sold in the event the north half does not sell for a sufficient amount to pay in full the amount remaining due upon the unpaid notes secured by said trust deed and costs.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8827

977

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 630²

BE IT REMEMBERED, that afterwards, to-wit: On
DEC 22 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Harry L. Morse,

appellee,

vs.

Appeal from the Circuit Court

of Peoria County

Peoria Star Company,

a corporation,

appellant,

DOVE, J.

As the result of an automobile collision, Harry L. Morse brought this action against the Peoria Star Company to recover damages for personal injuries and for damages to his Chevrolet truck and trailer. The declaration consisted of three counts, in the first count of which it was alleged that Richard Class, the agent and employee of the defendant, was driving an automobile in a northerly direction on State Highway No. 29 between Chillicothe and Sparland, Illinois on March 10, 1932, that the plaintiff was the owner of a Chevrolet, six wheel truck, and was driving it in a southerly direction on said highway, and while in the exercise of due care and caution for his own safety and for the safety of his truck, Class Negligently, carelessly and recklessly drove his automobile into the truck owned and operated by the plaintiff, and as a result, plaintiff suffered severe permanent injuries and his truck and trailer were completely wrecked. The negligence charged in the second count was that Class failed to keep to the right side of the center of the highway and drove defendant's motor vehicle to the left side thereof, as a result of which the accident occurred. The negligence charged in the third count was that Class carelessly and unlawfully

1998, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 2680, 26

... of the

10.1503/j.0007-1226.2005.00099.x

2007.01.10 10:00

1890

95

IB 21034

3009700 1000

● 11. 11. 11

.L. 700

truck and trailer.

drove and operated defendant's motor vehicle at a greater rate of speed than was reasonable and proper. A plea of the general issue and a special plea denying the ownership of the car were filed by the defendant and issues joined. Subsequently the special plea was withdrawn, a hearing had, resulting in a verdict for the plaintiff in the sum of \$4630.00, upon which, after overruling a motion for a new trial, judgment was rendered and the record is before us for review by appeal.

The evidence disclosed that about noon on March 10, 1932, appellee, accompanied by Nick Dick, was driving his Chevrolet truck, which had a two-wheeled trailer attached, in a southerly direction along Route No. 29. The pavement was dry and the sun was shining. The highway was straight, sloping slightly to the south, the concrete portion thereof being sixteen feet wide and having the usual black line down the center. The truck was loaded with coal mine props, which were being taken to the Crescent Mine south of Peoria. As appellee's truck approached the entrance to the Star Buck Mine, which is a couple of miles south of Sparland, it was following another truck driven by Irving Dietsch, also loaded with coal props, and which was proceeding in the same direction. Just after Dietsch passed the Star Buck Mine, Richard Class, a photographer employed by appellant and driving a Durant coupe approached from the opposite direction, that is, Class was driving north. He passed the Dietsch truck, swerved from his own traffic lane across the black line into the south bound traffic lane and collided with appellee's truck. As a result of the collision, Class was killed and appellee injured and his truck and trailer demolished. According to the testimony of appellee and Dick, the right front and rear wheels of appellee's truck were, at the time of the collision, off the pavement on the right or west dirt shoulder of the highway.

Appellant insists that the evidence discloses that Dietsch, the driver of the truck preceding appellee, was before and at the time of the collision hauling props for appellee, and at that time was appellee's employee, agent or servant; that the props on the Dietsch truck belonged to appellee, and Dietsch negligently loaded them or negligently permitted some of them to fall off his truck upon the pavement, and that after Class had passed the Dietsch truck, the left front wheel of Class' car struck these props, causing his car to swerve out of its traffic lane over upon the south bound traffic lane, resulting in the collision. Appellant therefore contends, first, that the evidence discloses that Class was not guilty of any negligence which proximately contributed to the injury. Second, that appellee was guilty of contributory negligence. Third, that appellant's motion for a new trial should have been granted because (a) the trial court erred in its instructions and (b) the damages are grossly excessive. As these contentions, other than the one challenging the court's instructions, have to do with questions of fact, it will be necessary to, at some length, review the evidence.

Appellee testified that at the time and place in question he was driving his truck and following the Dietsch truck about three hundred feet behind it, both trucks travelling about twenty to twenty-five miles per hour; that he observed the car driven by Class as it approached the Dietsch truck and as it passed it, and at that time it was being driven around fifty miles per hour; that he observed no props fall off of the Dietsch truck, saw none on the pavement in the space between his truck and Dietsch's ~~truck~~ as Class approached him from the south after Class had passed the Dietsch truck, did not see the Class car hit anything on the pavement and don't know what caused it to swerve into the west traffic

lane just before the collision. Nick Dick, who was riding in the truck with appellee, testified to substantially the same as appellee.

Glen Sarver testified that he was driving south in his automobile on this highway and was behind appellee's truck about four hundred feet at the time of the collision. He observed appellee turn his car to the right off of the pavement and saw the other car cross the black line over into the south bound traffic lane and saw the cars come together and didn't see the Class car strike any props.

Irving Dietsch, a brother-in-law of appellee, testified that on the day in question he was employed by the Illinois Nursery, driving a Ford truck; that acting upon the instructions from his boss at the nursery, he drove the truck north of Putnam and there loaded the props which belonged to appellee, and was on his way to deliver them when the accident happened; that he observed the Class car as it approached him, and it was swerving and he turned his car so that the right front and rear wheels of his truck were off the pavement on the right shoulder when the Class car passed him, and in his opinion the Class car was being driven at that time about fifty-five miles per hour. He heard the crash, looked back and saw that the collision had occurred on the west side of the road. He then stopped his truck, ran back to where the accident occurred and in his testimony described the position of the cars as he found them. He described how the props were loaded on his truck, stating that he, himself, loaded them that morning and that none of them were out of place after the collision, and that his load was in the same condition after the collision as it was before; that after the collision he did see some props on the pavement, the one farthest south being about ten feet south of the front wheels of appellee's truck.

line, they had to the collision. The car, which was driving in the
traffic lane, was struck by the collision. The car was
driving in the traffic lane and saw the car come to either side of the
traffic lane and saw the car come to either side of the traffic lane.
The car was struck by the collision.

Living, Diesel, a member of the Illinois
that on the day in question he was employed by the Illinois
ministry, driving a Ford truck; that seeing upon the instructions
from his boss at the ministry, he drove the truck north of
and there he had the people which belonged to the ministry, and was on
his way to deliver them when the accident happened; that he
saw the Diesel car at the intersection, and it was traveling
he turned his car to the right and saw Diesel's car
travel west off the intersection on the right side of the road.
and passed him, and in his opinion the Diesel car was going
at that time about fifty-five miles per hour. He saw the Diesel
looked back and saw that the collision had occurred in the west
side of the road. He then stopped the truck. The Diesel car was
accident occurred and he saw Diesel's car was going
the car was a Ford truck. He saw Diesel's car was going
on his truck, started west of Diesel's car, and saw Diesel's
and that some of them were out of line. He saw Diesel's car
that the Diesel car was in the west side of the road and was
and before that Diesel's car was in the west side of the road
westward, the Diesel car was in the west side of the road
from Diesel's car.

Harry Gowdy testified that he arrived at the scene of the collision shortly after it occurred and that he observed some props on the pavement six or eight feet in front of appellee's truck.

Admiral Davis testified for appellant that on the day in question he was operating the Star Buck Mine and at the time of the collision he was talking to Mr. Moffatt, a salesman for the Du Pont Powder Company, who was sitting in an automobile which was parked on the west side of the pavement, not far south of the place of the collision, the east side of the automobile in which Moffatt was sitting being about five feet from the west side of the pavement. The car was faced south and Mr. Davis was standing on the west side of the car facing east with his back to the west, and did not see the collision as it occurred north of where he was standing. He further testified that he observed the trucks of Dietsch and appellee, which were separated seventy or seventy-five feet and were each travelling about twenty-five to thirty miles per hour; that he observed seven or eight props on the pavement in front of appellee's truck before the collision which had fallen off of the Dietsch truck.

Dale Kilmer testified that he was driving a truck on Route No. 29 and going after a load of coal on March 10, 1932 and came to the place where the collision occurred shortly after it happened. That when he arrived, there were several persons there, and they were placing Class in an automobile and he observed at that time that there were several props on the pavement about forty feet in front of appellee's truck.

Arthur Sweeney, a state highway policeman, arrived some time after the collision and observed some props along the pavement on the shoulder, but none on the pavement itself.

Nathan Jackson testified that he was driving a truck on

the day of the accident and going north on this highway, and Class had passed him almost one-half mile south of the place where the collision occurred; that thereafter he followed the Class automobile, driving forty or fifty feet in its rear, and that both cars were travelling about twenty-five miles per hour; that he saw the collision and observed props upon the pavement after Class passed the Dietsch truck and observed Class run into these props some forty feet south of the point of collision.

This is substantially all the evidence which throws any light upon the conditions as they existed at the time of and just before the collision. All of the evidence in this record is to the effect that appellant's car came into collision with appellee's truck on the west side of the black line which separated the north and south bound traffic; that at the time of the collision appellee was driving his truck in its proper traffic lane, at a reasonable rate of speed and the weight of the evidence is to the effect that appellee's truck was not at an unreasonably close distance to the Dietsch truck. The uncontradicted evidence is to the effect that the truck which Dietsch was driving belonged to the Illinois Nursery Company; that the props being hauled therein were the props of appellee; that the manager of the Nursery Company, Worley, directed Dietsch to haul them; that appellee told Worley to have them hauled and that the Nursery Company was getting coal from appellee and was being paid by appellee for having Dietsch haul them. There was evidence before the jury as to the manner in which the props were loaded and there was some evidence that some of these props did fall from the Dietsch truck to the pavement and that Class ran into them. There is other evidence to the effect that none fell from Dietsch's truck and that Class did not run into any and the evidence is also conflicting as to the rate of speed the Class car was travelling as it passed the Dietsch truck and approached appellee. Appellant's

The day of the accident was a rainy day in the morning and the
had passed his almost two-half mile south of the intersection the
collision occurred; that is, that he followed the same course
left, driving forty or fifty feet in the road, and then they were
were travelling about twenty-five miles an hour, and they were
collision and occurred from the westward direction.
the motor truck and occurred about the same time as the
forty feet south of the point of collision.

This is substantiated by the evidence which shows that

light was the condition, a road marked at the time of the day

before the collision. It is the evidence in this case that

the effect that appellant had when into collision with appellant's

truck on the west side of the line which separated the road

and south bound traffic; that at the time of the collision appellant

was driving his truck in the same traffic lane, and a motorist

rate of speed and the nature of the evidence is to the effect that

appellant's truck was not at a reasonably close distance to the

motor truck. The undisputed evidence is to the effect that

the truck which appellant was driving belonged to the Industrial

Company; that the truck which appellant was driving was

appellant; that the number of the company truck, which is

indicated to him that that appellant had been in the same

and that the company truck was driving east from the west

being with the appellant had passed appellant's truck. There was

heard before the time at the intersection of the road where

and there was some evidence that at that time appellant's truck

the motor truck was driving east from the west.

is other evidence that appellant was driving east from the west

truck and that appellant did not see the motor truck until

confronted as to the fact of speed the motor truck was

as it passed the motor truck and appellant's truck.

theory that Dietsch was negligent either in loading the props or in driving, so as to permit them to fall off his truck upon the pavement and that Dietsch at the time was the agent and servant of appellee so that appellee is responsible for any negligence of Dietsch was not adopted by the jury. Appellee's contention that no props fell from the Dietsch truck, but for some unexplained reason Class lost control of his truck and that the props that were seen on the pavement after the accident came from appellee's truck and that Dietsch was not the servant or employee of appellee, but of the Illinois Nursery Company, was adopted by the jury. Whether Dietsch was the servant of appellee and if he was, whether he was guilty of such negligence as would bar a recovery by appellee and whether appellant's servant, Class, was guilty of negligence in operating his car were all questions of fact to be determined by the jury under proper instructions of the court, and unless some reversible error was committed by the trial court in its instructions to the jury, we would not feel justified in disturbing the findings of the jury on these questions.

In this connection, appellant insists that the charge of the court to the jury was erroneous. The record discloses that the court received suggestions from counsel for both parties as to what should be embodied in the court's instructions and that counsel for appellant requested that the court should give to the jury the following: "If you believe from the evidence in this case that the props which were loaded on the truck being driven by Irving Dietsch were the property of the plaintiff in this case, and that said props were being hauled by said Irving Dietsch for the plaintiff, then the plaintiff would be responsible for any negligence in the manner in which said props were loaded, if any, if you believe from the evidence that some of said props fell off of said truck and in any way contributed to the accident in this case". The court advised

counsel that this suggestion would be embodied in the instructions, whereupon counsel for appellee requested that the court add thereto the following: "But if you believe from the evidence in this case that said props were being hauled by said Irving Dietsch for the Illinois Nursery Company and not for the plaintiff, then the plaintiff would not be responsible for any negligence in the manner in which said props were loaded". Appellant thereupon objected and stated his objections as follows: "For the reason that said instruction is not based upon any competent evidence in the case and for the reason that there is no proof whatever that said props were being hauled for Illinois Nursery Company". Appellant's objection was overruled and the court embraced the same in its charge.

In their argument, counsel for appellant say that the objected portion of the instruction entirely absolved appellee from any responsibility even though he observed the careless manner in which the props were loaded or even if he saw the props falling from the truck ahead of him. The objection made by counsel before the jury retired was that the objected portion was not based upon any competent evidence, and that there was no proof that the props were being hauled for the Nursery Company. Appellee testified that the Illinois Nursery Company was getting coal from him and that it hauled the props for him for pay. Dietsch testified that upon the day and occasion in question, he was employed by the Illinois Nursery hauling props and taking coal back in a truck belonging to the Nursery Company. Upon cross examination, counsel for appellant asked Dietsch: "And while you were employed by the Illinois Nursery Company, you were hauling the props for him (appellee), weren't you?". To this question Dietsch replied: "No sir, I was hauling them for the Illinois Nursery". There is evidence in the record therefore, upon which this instruction was based and counsel's

... counsel that this suggestion was embodied in the indictment. ...
... counsel for appellee maintained that the money was the ...
... the following: "But as we believe from the facts in this case ...
... that said props were being handled or sold during the time the ...
... Illinois Nursery Company and not for the plaintiff, then the plain- ...
... will would not be responsible for any negligence in the matter in ...
... which said props were sold". Appellant presented evidence and ...
... stated his objections as follows: "For the reason that said in- ...
... statement is not based upon any competent evidence in the case and ...
... for the reason that there is no proof whatever that said props were ...
... being handled for Illinois Nursery Company". Appellant's objection ...
... was overruled and the court entered the same in its verdict. ...
... In their argument, counsel for appellant say that the ob- ...
... jected portion of the instruction entirely excluded appellee from ...
... any responsibility even though he observed the alleged transfer in ...
... which the props were loaded or even if he saw the props falling from ...
... the truck ahead of him. The objection made by appellant against the ...
... jury noticed was that the objected portion was not based upon any ...
... competent evidence, and that there was no proof that the props were ...
... being handled for the Nursery Company. Appellee testified that the ...
... Illinois Nursery Company was getting coal from him and that it ...
... handled the props for him for pay. Witness testified that upon the ...
... day and occasion in question, he was employed by the Illinois Nursery ...
... Company and taking coal from a truck delivered to him ...
... Nursery Company. Upon cross examination, counsel for appellant asked ...
... witness: "and while you were employed by the Illinois Nursery ...
... Company, you were handling the props for him for pay, weren't you?" ...
... Yes. To this question witness replied: "Yes, sir, I was handling ...
... them for the Illinois Nursery". There is evidence in the record ...
... therefore, that this instruction was proper in the circumstances.

objection, made before the jury retired to consider of the case, was, therefore, properly overruled, and the trial court, in view of the fact that it embodied in its instructions practically the converse of this proposition at the request of appellant, did not err in giving to the jury the objected to portion of the charge. We have read the trial court's complete charge as the same appears in the record, and are of the opinion that appellant has no just cause for complaint.

The only remaining contention of appellant is that the damages are grossly excessive. This, too, is a question of fact for the determination of the jury under proper instructions from the court, and the instruction of the court to the jury upon this feature of the case is not complained of. The evidence discloses that appellee's truck, which was wrecked, was worth between \$450.00 and \$475.00 at the time of the collision and that the trailer was damaged to the extent of at least \$100.00, and that appellee expended for medical treatment \$98.50. It also appears from the evidence that from the date of the accident until June of that year, appellee did not work, and in June he employed another man to drive his truck, and do the heavy lifting, paying him therefor \$20.00 per week, and this continued approximately fifteen months and until September, 1933. Immediately after the collision appellee was taken to Henry to the hospital, and there treated for cuts on his face received in the collision. He was able, however, to attend the coroner's inquest held over the body of Richard Class that afternoon and at an adjourned session the next day. For two weeks thereafter he remained at home, complaining chiefly of his back. On March 25th, following the accident, X-ray pictures were taken by Dr. Dysart, but these pictures did not disclose any injuries to the bony structure of the spine. Further X-ray pictures were taken on August 13, 1933

and in January, 1934, but they were not offered in evidence. In addition to being treated by Dr. Dysart, he was also examined by Dr. Cooper and Dr. Diller. Shortly after the collision, Dr. Dysart examined appellee and found that he could not move his back freely, either backward or sideways. Dr. Cooper testified that upon examination several months later, he found a definite limitation of forward bending motions and it was Dr. Dysart's opinion that the stiffness in his back would be permanent. "The pain", so testified this physician, "will improve as time goes on, but it will be followed by a stiffness of the back with some limitation of motion, which he will have the rest of his life." We have read all the evidence in this record and while we believe the amount of damages awarded appellee is quite liberal, we hesitate to say they are so excessive as to require this case to be submitted to another jury.

There is no reversible error, in our opinion, disclosed by this record, and the judgment of the trial court is therefore affirmed.

JUDGMENT AFFIRMED.

and in January, 1934, was long and was filled in with a
address to which directed to Mr. [redacted], of the [redacted]
T. [redacted] Mr. [redacted] [redacted] the [redacted] [redacted]
[redacted] [redacted] and [redacted] [redacted] [redacted] [redacted]
[redacted] [redacted] or [redacted]. Mr. [redacted] testified that [redacted]
examined several months later, he found a [redacted] [redacted]
of [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]
[redacted] in his back [redacted] [redacted] [redacted] [redacted]
this physician, "will [redacted] [redacted] [redacted] [redacted]
followed by a [redacted] of the [redacted] [redacted] [redacted] [redacted]
which he will have the [redacted] of his life." [redacted] [redacted] [redacted]
evidence in this record and will be [redacted] the [redacted] of [redacted]
[redacted] [redacted] in [redacted] [redacted], he [redacted] to [redacted] [redacted] [redacted]
[redacted] as to [redacted] this case to be [redacted] [redacted] [redacted] [redacted]
There is no [redacted] [redacted] [redacted] [redacted] [redacted] [redacted] [redacted]
this record, and the [redacted] of the trial [redacted] [redacted] [redacted]
affirmed.

WILLIAM [redacted]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8837

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

277 I.A. 630³

BE IT REMEMBERED, that afterwards, to-wit: On
DEC 22 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Trustees of Schools of Township
Thirty-three (33) North, Range
Two (2) East of the Third (3rd)
Principal Meridian,

Appellee,

vs.

Appeal from the Circuit Court

of La Salle County

E. E. Childers, George M. Reynolds
and J. J. Hornung,

Appellants.

DOVE, J.

This is an action of debt, instituted on a school treasurer's bond. The declaration is in the usual form and the bond sued on is the official statutory bond of appellant, E. E. Childers, the treasurer. From the original and supplemental affidavit of claim, it appears that on June 24, 1930 Childers was elected school treasurer and thereafter on August 1, 1932 qualified by executing a bond as required by law and it is this bond which forms the basis of this suit. It further appears that Childers continued to act as school treasurer from August 1, 1930 until August 1, 1932, and during his term of office, he had, as treasurer, on deposit with the Utica State Bank the sum of \$11,464.94 on the day the Utica State Bank suspended business, which was October 2, 1931. The affidavit further states that on August 1, 1932, Childers as treasurer had in his hands, as money belonging to the plaintiff, the sum of \$13953.26; that demand for that sum was made, of which \$1,721.30 was paid, leaving a balance due the plaintiff of \$12,231.96. The supplemental affidavit stated that at the time Childers ceased to act as township treasurer, there was due from the receiver of the Utica State Bank the sum of \$10,318.45, since

755 . 7 . 5

1911

1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 25

(U) [REDACTED] (U) [REDACTED]
[REDACTED] (U) [REDACTED] (I) OOT
[REDACTED] [REDACTED]

249545

FROM JOHN W. M. L. L. L.

THEORY OF LINGUISTICS

W. J. Childers, Jr., Secretary
and J. L. Johnson

• 11 11 11

D. L. D.

which time \$573.24 has been received by plaintiff, so that at the time the supplemental claim was filed on February 26, 1934 there was due plaintiff, from defendants, the sum of \$11,658.72, instead of \$12,231.96.

To this declaration the defendant filed a plea of the general issue and an affidavit of merits executed by defendant Childers, which was subsequently amended. In this affidavit of merits as amended, the defendant Childers stated that he was of the opinion that the defendants had a good defense on the merits to the whole of the plaintiff's demand; that he, Childers, was elected and qualified as treasurer on July 1, 1930 and that his term of office expired on July 1, 1932; that on April 4, 1932 a regular meeting of the trustees was held, at which time he submitted a report showing the amount of the funds he then had on hand as treasurer, and as a part of the assets in his hands at that time, there was a promissory note for the sum of \$3200.00, executed by himself; that at this meeting his report was approved and he thereafter paid on said note the sum of \$140.00, and that there is still due from him on said note the sum of \$3,060.00; that prior to the expiration of his term of office, the Utica State Bank was placed in the hands of a receiver and on the day it closed, he had on deposit therein the sum of \$11,464.94, and as such treasurer he subsequently filed a claim for that amount with the receiver; that he does not know the amount of the dividends that has been paid thereon, as they have been paid to his successor; that on October 3, 1932 a regular meeting of the Board of Trustees was again held, at which time a resolution was adopted which recited that affiant, as the former treasurer, was short in his accounts at the expiration of his term of office, in the amount of \$3,060.00 and directed that the account be placed in the hands of the State's Attorney of La Salle County for collection. The

affidavit of Childers further states that the shortage so found was the balance due on his promissory note, the original note being for the sum of \$3200.00, upon which he had paid \$140.00 thereon; that the claim which he had made as treasurer against the Utica State Bank had been transferred to the name of his successor and by virtue thereof and because of the resolution of the Board of Trustees on October 3, 1932, affiant concludes that the question of the liability of the defendants upon the bond is a question of law, which affiant is unable to determine, but in his best judgment the facts set forth in his affidavit do constitute a defense to the entire demand of the plaintiff. The affidavit of merits further states that the claim against the Utica Bank and the promissory note of the plaintiff are both in the possession and the control of the plaintiff.

A motion was made by appellee to strike this amended affidavit of merits and the plea of the general issue, from the files, and to enter judgment as in case of default. Upon a hearing thereof, the motion was allowed, the affidavit and plea stricken and the cause was heard as to the assessment of damages upon a stipulation of the parties, which disclosed that if the books, records and files of the treasurer were produced and offered in evidence, that they would show a balance due from Childers of \$11,658.73 and that the accrued interest thereon would aggregate to the date of the hearing \$932.23. The court thereupon rendered judgment in favor of the plaintiff and against the defendants for \$35,000.00, the amount of the bond to be discharged upon the payment of \$12,590.96. From this judgment the defendants below have brought the record to this court for review by appeal.

The facts which appellants set up in the affidavit of merits and which they insist presents a defense and precludes a recovery in this case are, first: that as to the sum of \$3200.00 defendants are

ATTORNEYS OF MICHIGAN TRUST COMPANY, CHICAGO, ILLINOIS, AND THE
AND THE BELIEF OF HIS HONORABLE COURT, THE BELIEF OF THE
IN THE SUM OF \$100,000.00, WHICH WOULD BE PAID TO THE
THAT THE TRUST WOULD BE PAID TO THE TRUST COMPANY, CHICAGO, ILLINOIS,
TRUST, AND THE BELIEF OF HIS HONORABLE COURT, THE BELIEF OF THE
BY THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
OF THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
LAW, WHICH WOULD BE PAID TO THE TRUST COMPANY, CHICAGO, ILLINOIS,
THAT THE TRUST WOULD BE PAID TO THE TRUST COMPANY, CHICAGO, ILLINOIS,
TO THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
FURTHER STATES THAT THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
WHICH WOULD BE PAID TO THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
COURT OF THE TRUST COMPANY.

THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
DIVISION OF TRUSTS AND THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
AND TO THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
TRUST WOULD BE PAID TO THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
OF THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
OF THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
WOULD BE PAID TO THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
RECORDED IN THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
\$100,000.00. THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
TRUST WOULD BE PAID TO THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
ONLY FOR THE TRUST COMPANY.

THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
AND THE TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,
THIS TRUST COMPANY, CHICAGO, ILLINOIS, AND THE BELIEF OF HIS HONORABLE COURT,

not liable because on April 4, 1932 the treasurer presented his report to the trustees which disclosed that a promissory note for \$3200.00 executed by himself was an asset in his hands as treasurer; that this report was approved by the trustees and that he thereafter paid upon said note the sum of \$140.00; that at another regular meeting of the trustees held on October 3, 1932, the account of the treasurer was being considered and a resolution was adopted by the board finding the treasurer's account short in the sum of \$3060.00, his payment of \$140.00 having been credited upon the \$3200.00 sum evidenced by his note. Second: that as to the balance claimed to be due the defendants are not liable therefor, because during the time Childers was treasurer he deposited funds in the Utica State Bank which was closed by the Auditor and at the time it was closed he had on deposit in said bank the sum of \$11, 464.94, for which amount he filed a claim, which claim was "afterwards changed to the name of the present treasurer", and the present treasurer is collecting the dividends thereon. Third: that the claim against the bank and the note of Childers are in the possession and control of appellee.

There was no error in striking from the files this affidavit which recited the foregoing as a defense to the whole of plaintiff's demand. No defense to plaintiff's claim is presented by anything stated therein. The fact that in lieu of \$3200.00 (for the safekeeping of which the bond which forms the basis of this suit was given), the treasurer executed his note therefor, and so reported to the trustees, who at one time approved his report and six months later, on the same facts, found that he was a defaulter, in the amount which remained unpaid upon said note, is not a defense to this action, nor is the retention of that note by appellee a defense. Nor is the fact that the Utica State Bank failed at a time when the treasurer had a portion of his funds deposited therein, and the former treasurer filed a claim therefor, which claim

not liable to be paid by the trustee company and the
part to the trustee company which is a company of the
1920.00 executed by himself and the trustee company
that this report was received by the trustee company and that the trustee
this report said that the sum of 120.00; that the trustee company
ing of the trustee company in October 1921, the account of the trustee
or was being considered and a resolution was passed by the trustee
finding the trustee company's account correct at the sum of 120.00, the
payment of 120.00 having been received from the trustee company and the
damaged by his note. Second: that he is the holder of the note
due to the trustee company and that the trustee company is liable to him
children was transferred to the trustee company and the trustee company
which was closed by the trustee company and the trustee company is
of deposits in said bank was 121, 000.00, the same amount as
which is held, which is held in the trustee company and the trustee
the trustee company, and the trustee company is liable to
the trustee company. Third: that the trustee company, the trustee
the note of the trustee company in the trustee company and the trustee
There was no other in addition from the trustee company
Davis which received the trustee company in a letter to the trustee
the trustee company. No further to the trustee company is mentioned
by the trustee company. The last part is that of 120.00
(for the trustee company of which the trustee company is the trustee
this is the trustee company, the trustee company is the trustee
so reported to the trustee company and the trustee company is the trustee
and the trustee company, so the trustee company is the trustee
1920.00, at the amount which the trustee company is the trustee
not a trustee in this matter, but is the trustee company and the trustee
appears to be correct. Now in the year 1921 the trustee company is the trustee
at a time when the trustee company is the trustee of the trustee company
thereon, and the trustee company is the trustee company, which is the

had afterward been changed to the name of the present treasurer and the receiver of the bank had paid dividends thereon to the present treasurer, present any defense.

Under all the authorities in this state, a school treasurer is an insurer of the funds entrusted to his care. Simply because he has access to the funds collected from the tax payers to maintain their schools does not authorize him to appropriate those funds to his own use and report to the trustees that he has borrowed such an amount, nor does the law permit the trustees, even though they may go on record as approving such conduct, to be so liberal with money which is not theirs. The treasurer occupied a position of trust and confidence, so did the members of the board of trustees. Official duty is not discharged by appropriating the money of another or by approving such conduct, after it has been done.

Rule nine of this court provides that the brief of appellant shall contain a short and clear statement of the case, showing the nature of the action, the nature of the pleadings, the leading facts, how the issues were decided and the errors relied upon for reversal. This rule also provides that this statement shall be followed by the propositions of law and the authorities relied upon to support them. This rule should be observed and its provisions followed by counsel bringing cases to this court. In the instant case, nowhere in appellants' statement is found a statement of the errors relied upon for reversal, nor is the statement followed by any propositions of law and authorities relied upon by appellant. Immediately following the statement is the argument. We recognize the difficulty which counsel would have in formulating any propositions of law and in finding any authorities to support the defense sought to be interposed herein.

While appellants' statement is not followed by any brief of authorities, counsel for appellants cite two cases in their

had otherwise been shown to the name of the person presenting
and the receipt of the bank and said person's signature to the
present document, present and future.

Under all the circumstances in this case, a sound measure-
ment is an answer of the bank made to his case. It is not
He has access to the bank's records from the bank's records to which
their records does not authorize him to appropriate bank funds in
his own name and report to the bank that he has borrowed such an
amount, nor does the law require the bank, even though they may
be or receive a private and consent, to be so liberal with money
which is not theirs. The statement which is a condition of their
and confidence, to aid the bank of the bank of their
Official duty is not to be a condition of the bank of
another or of a person who is not a member of the bank of
Banks and of their records that the bank of their
bank shall contain a short and clear statement of the bank's
the bank of the bank, the bank of the bank, the
leading facts, how the bank's records are to be used and
upon the bank's records. The bank's records are to be used
shall be followed by the bank's records of the bank's records
referred upon the bank's records. This rule should be observed in its
provisions followed by common sense and common sense in this case. In
the instant case, no more is required. Statement is found a
statement of the bank's records upon the bank's records, and in the state-
ment followed by the bank's records of the bank's records
upon the bank's records. The bank's records are to be used in the
statement. The bank's records are to be used in the statement
formulation and provisions of the bank's records and authorized
to support the bank's records and to be followed by the bank's
This statement is not followed by the bank's records
of authorized, necessary for the bank's records and to be followed

argument. One is *Town of Cheney's Grove v. Van Scoyoc*, 357 Ill. 52. We have had occasion in an opinion filed this day to refer to that case at some length. *Trustees of Schools v. Farnsworth*, Gen. No. 8815. There is nothing said in the *Van Scoyoc* case which throws any light upon the matters under consideration here. The other case referred to in the argument is *Bruner v. Wolford*, 356 Ill. 514. In that case it was sought to hold the estate of one who had been a conservator and subsequently executor of an estate, upon a loan made by him from funds belonging to his ward. It appeared that the conservator had not obtained the consent of the Probate Court before making the loan, but afterward he presented his annual reports as conservator during the period of his conservatorship, which disclosed the loan, and he exhibited, with his report, the notes, securities and evidences of the investment which he had in his possession, and these reports were approved. In its opinion, the court quoted the statute concerning loans by a conservator to the effect that they shall all be subject to the approval of the court, but stated that the Act does not require the conservator to procure authority to make a loan before the loan is made, and held that the estate of the conservator was not liable on the ground that the conservator had committed a devastavit in making the loan. The *Bruner* case can not be held to be an authority for the proposition advanced by appellants to the effect that the approval by appellee on April 4, 1932 of Childers' report as treasurer would bar the action of appellee to prosecute this suit upon the treasurer's official bond.

The law provides that all money which came into Childers' hands as school treasurer could only be paid out upon warrants drawn by appellee. *Cahill Illinois Revised Statutes*, 1933, Chap. 122, Sec. 81, par. 81. Furthermore, under the authority of *Whitlow v. Trustees of Schools*, 191 Ill. 457, the trustees had no power to

loan the money to the treasurer, and if they approved his action and accepted his note in settlement of his defalcation, their action in so doing was of no force or effect and would not release appellants or any of them in this action, nor would it bar appellee from successfully prosecuting this suit.

In our opinion there was no error in striking appellants' plea and affidavit of merits from the files, or in rendering the judgment appealed from, and that judgment is therefore affirmed.

JUDGMENT AFFIRMED.

from the money to the Government, and it being agreed that the
accused his note in evidence of the Government, which would be
so doing was of no force in effect and would not release applicant
or any of them in this matter, and would be not binding upon the Government
in any proceeding in this matter.

In the opinion of the Court, the Government is entitled to the
same and the Government of the United States, in its proceeding, the
indemnity provided for, and the Government is entitled to the same.

THE COURT DECIDED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

502
Detractions - 100 to 1000 - 1924
H
PUBLISHED IN ABSTRACT

Clifford Henry, Plaintiff, v. Frank Morris, Defendant.

Appeal from the Circuit Court of Edgar County.

APRIL TERM, A. D. 1934.

277 I.A. 630⁴

Gen. No. 8817

Agenda No. 3

MR. JUSTICE ALLABEN delivered the opinion of the Court.

In May, 1931, Arthur Henry purchased from Frank Morris a team of gray horses named Prince and Dick for One Hundred Dollars (\$100), for which Arthur Henry gave a note in the usual form, with power of attorney, on the face of which note was written: "This note is secured by a gray team Prince and Dick". The note was given to Frank Morris at the time the team was delivered to Arthur Henry by him. On January 15, 1932, Arthur Henry, being indebted to his brother, Clifford Henry, executed a note to his brother, and to secure the same gave him a chattel mortgage on certain farm machinery, grain and animals, including the two horses purchased from Morris. When this note became due a new note and mortgage were executed on or about January 27, 1933. The new mortgage also included the team of horses in question. Arthur Henry later desired to sell the horses, and arranged a sale with one Guy Humerickhouse, but when he refused to apply the price of the horses upon the mortgage debt held by Clifford Henry the said Clifford Henry demanded the horses, and they were brought back to Arthur Henry, and the check which had been tendered in payment therefor was returned. Following this Frank Morris took possession of the team with the consent of Arthur Henry. Clifford Henry then made a demand upon defendant, Morris, for possession of the horses, and upon demand being refused, said Clifford Henry replevined the team. Defendant Morris' basis for claiming possession of this property is upon an alleged oral agreement at the time of the execution of the original note between himself and Arthur Henry to the effect that the title to the team was to remain in him until the note originally given in payment of said team was paid. Upon trial before a jury the issues were decided in favor of the defendant, and the motion was then made by plaintiff to set aside the verdict and to grant a new trial, which was denied, and judgment was entered on the verdict.

The question involved in this controversy is whether the notation placed upon the original note given to purchase Prince and Dick, "This note is secured by a gray team Prince and Dick", coupled with the conversation between Arthur Henry and Frank Morris, to the effect that the team should remain the property of Frank Morris until the note was paid, constitutes a conditional sales contract which can be enforced as against the rights claimed by plaintiff under his chattel mortgage. Obviously, the most important part of this agreement, if such it be, is the intention of the parties as expressed by the notation placed on the purchase note, together with their conversation. Where a contract is partly in writing and partly parole, parole evidence is not admissible to vary or modify the terms of that part of the agreement which has been reduced to writing. (*Hueni v. Freehill*, 125 Ill. App. 345). In the instant case the parole evidence which has been giving to support defendant's case does not modify in anywise the written terms of the alleged agreement contained in the note, but confirms it. It is, therefore, evident from the notation on said note that it was the intention and the contract of the parties thereto to have the team stand as security for the obligation; title to remain in Morris until paid.

The plaintiff complains that parole evidence was admitted to alter the terms of a written contract, and cites authorities in support of that position. It appears to us that said testimony was properly admitted because the same tends to confirm the written agreement. Chapter 121½, Smith-Hurd Revised Statutes 1933, paragraph 3, provides that a conditional sales contract may be in writing, either with or without seal, or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties. There is considerable testimony which we believe was properly admitted, which indicated that plaintiff had knowledge of this oral conditional sales contract prior to the execution of the first chattel mortgage.

Several witnesses testified that Clifford Henry was present at a meeting with R. P. Morris, father of Frank Morris and Arthur Henry before the execution of the mortgage, in which Morris told Clifford Henry that if he put the team in his mortgage they would have to stand as they were, and that the team was the property of Frank Morris until it was paid for, and further that Clifford Henry, the plaintiff, said that such an arrangement was all right. This is denied by Clifford Henry. Therefore, we are of the opinion that

the trial court properly submitted these matters to a jury for determination of fact.

Considerable complaint is made as to certain instructions, some of which were given, some of which were refused, and some of which were modified, but inasmuch as we are cited no authority which would in any way indicate that the refusal, admission or modification were incorrect, and no mention is made thereof in the brief, and further, inasmuch as all of the instructions are not included in the abstract, we decline to say reversible error was committed.

The doctrine of conditional sales is recognized in Illinois in favor of the original vendor except as against bona fide purchasers and execution creditors. (*Herbert v. Rhodes-Burford Furniture Co.*, 106 Ill. App. 583). (*Staver Carriage Co. v. Richardson*, 203 Ill. App. 620). In this case the preponderance of the testimony is to the effect that Clifford Henry, as mortgagee, was not an innocent party, but had been informed prior to the execution of the chattel mortgage that the team in question was to stand as security for the debt to Morris. Therefore, the jury, in finding for the defendant in the trial court was warranted in returning a verdict for the defendant. For the reasons given above the judgment of the trial court is affirmed.

Judgment affirmed.

(Five pages in original opinion)

PUBLISHED IN ABSTRACT

Rock Island Plow Company, a corporation, Plaintiff,
v. E. C. Smith and Louise B. Smith, Defendants.

Appeal from the Circuit Court of Vermilion County.

APRIL TERM, A. D. 1934.

277 I.A. 630⁵

Gen. No. 8832

Agenda No. 13

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This is an action in the nature of the common law writ of audita querela, brought under Illinois practice by a petition to satisfy a judgment. The plaintiff in the original action upon which the judgment was obtained remained plaintiff, and the petition to satisfy the judgment was brought by the defendant in the original action.

On July 21, 1931, Rock Island Plow Company, a corporation, plaintiff, recovered a judgment against E. C. Smith and Louise B. Smith, defendants, for Fifteen Thousand, Seven Hundred, Fifty-One and 24/100 Dollars (\$15,751.24), in the Circuit Court of Vermilion County. On June 21, 1933, an execution was issued out of said court, and the sheriff made a levy on certain chattels. Transcripts of said judgment were filed in Lee and Will Counties.

E. C. Smith and Louise B. Smith, defendants, filed their petition to the October Term, A. D. 1933, in the original action, seeking to have the judgment satisfied of record. The petition sets forth the original judgment, the issuance of the writ of execution, the filing of the transcripts in Lee and Will Counties, the levy by the sheriff under the execution issued on June 21, 1933, the seizing of the chattels, and the selling of the same for the sum of Forty-Two Hundred Dollars (\$4,200), and the further fact that on August 22, 1932, after the rendition of the original judgment, plaintiff and defendants entered into a written contract whereby the judgment was discharged and satisfied and ought to be satisfied of record; that said contract provided that defendants turn over to plaintiff in satisfaction of the judgment certain chattels, which defendants did do; and that the sheriff's levy was upon the same chattels.

To this petition plaintiff filed answer denying that the contract was entered into as alleged in the petition, denying that the judgment was satisfied or discharged; denying that the contract is the contract of

plaintiff by its agent, Harry H. Johnson; denying that Harry H. Johnson had any authority to make and enter into said contract; denying that plaintiff held him out as having any authority to make the same for them, denying that he made and entered into similar contracts in similar cases, and further averred that the first notice plaintiff had of the execution of said contract was December 28, 1932, which plaintiff first discovered through a talk between defendants and plaintiff's attorney, whereupon defendants were at once notified by mail that said contract was repudiated and disavowed.

Trial was had in the Circuit Court of Vermilion County. The trial court directed a verdict in favor of the plaintiff, and judgment was entered thereon. The Court further denied a motion made by defendants to arrest the original judgment in favor of plaintiff. It is from this judgment that the defendants appeal to this Court.

It appears from the evidence that defendant, E. C. Smith was, on August 22, 1932, and for sometime prior thereto in the implement and automobile accessory business at Rossville, Illinois, also buying and selling farm machinery. That on July 21, 1931, the plaintiff recovered a judgment against defendants E. C. and Louise B. Smith, in the sum of Fifteen Thousand, Seven Hundred, Fifty-One and 24/100 Dollars (\$15,751.24). That on August 22, 1932, a man by the name of Johnson came to Smith's place of business and asked if the Smiths would settle the judgment in favor of the plaintiff; that Smith said he was agreeable to so doing, and thereupon Smith, Louise B. Smith, his wife and co-defendant, and Johnson, went to the office of Smith's attorney in Danville where a document was executed and signed by E. C. Smith, Louise B. Smith, designated as parties of the first part. The typewritten insignia, "The Rock Island Plow Company, a Corporation," signed "Harry H. Johnson", under which appeared "Its duly authorized agent and representative" also appeared thereon.

Without setting out the document in haec verba we will say that the same, if binding upon the plaintiff, would constitute a full satisfaction of the original judgment. The contract was signed in duplicate, Smith keeping one and Johnson taking the other. Johnson left that evening. After signing the contract Smith kept the machinery in storage for the plaintiff and did not dispose of any. Plaintiff had not released the judgment. Defendants' Exhibits 1 and 2, being contracts of sale running from Delbert Hutsler and O. T. Evans, to Harry H. Johnson, and by him indorsed, of

various amounts of corn, and Defendants' Exhibit 6, which is a letter from the Rock Island Plow Company, Collection Department, to Mr. E. C. Smith, regarding certain collateral notes held by the company, which it was returning, and, in addition, two bills of sale of O. T. Evans and Delbert Hutsler, as mentioned above, were sent Smith by the Rock Island Plow Company. It appears Louise B. Smith was present when the alleged contract of satisfaction was handed Smith by Johnson; that the first time E. C. Smith ever saw Defendants' Exhibits 1 and 2 was in the month of October, 1933, that he was not present when either was signed; that Hutsler and Evans owed him notes as Rossville Motor Company; that these notes for which Defendants' Exhibits 1 and 2 were taken as security, had at one time been placed with Rock Island Plow Company but had been taken down, and one of said notes was afterwards returned. When Johnson called on August 22, 1932, E. C. Smith did not ask Johnson for his authority as agent, and never did ask to see his authority; that before defendants signed the purported satisfaction of judgment Johnson told him (Smith) that he (Johnson) had settled the demands against Evans and Hutsler and sent them contracts, and that he (Smith) acted and relied on that information.

Louise B. Smith, defendant, testified in practical agreement with her husband's testimony as to what occurred on the day of the execution of the purported satisfaction of judgment, but makes no mention of any oral representations made by Johnson. O. T. Evans testified that in August, 1932, a man whom he did not know called upon him, and he (Evans) signed Defendants' Exhibit 2, and then took it away. That no one ever asked him for any money on this exhibit, and he had not paid any.

Defendants also introduced the deposition of Harry H. Johnson taken previously, which was as follows: That he lived at South Bend, Indiana, and during August, 1932, was working for plaintiff; that about a week before August 22, 1932, he went to Rossville, Illinois, or in the vicinity; that Defendants' Exhibits 1 and 2 were in his possession while working at Rossville; that blanks were part of his supplies furnished by plaintiff; that so far as he knew the people who signed the contracts were the people whose names appeared therein; that the two parties owed the Rock Island Plow Company past due accounts and he was sent to collect them; he interviewed the two parties, and took the two instruments; that he signed his name, H. H. Johnson, on the back of Exhibit 1, but did not

sign it where it appeared on the back of Exhibit 2; that he did not know whether he mailed those two to plaintiff; that he mailed a bunch of stuff to Rock Island, but whether Defendants' Exhibits 1 and 2 were included he could not tell but thought they were; that he could not tell just to whom he gave them; could not tell how many contracts of this character he took in the vicinity of Rossville; did not suppose more than five or six; that this was one way of satisfying obligations; that he did not indorse all of the blue colored contracts on back; that in his settlement with Rock Island he had thirty or forty contracts lying around not indorsed and sent them through the mail giving the privilege to transfer those to plaintiff; did mail some, not indorsed, and sent a power of attorney or blanket indorsement; that he received Defendants' Exhibit 3, (same being a letter dated August 24, 1932, from plaintiff to Johnson to the effect that the assignment of all bills of sale taken by Johnson were satisfactory and the assignments would be indorsed on all bills of sale bearing his name), shortly after August 24, 1932; that he received Defendants' Exhibit 4, (this exhibit was never offered in evidence) four or five days after its date; that his signature appeared beneath the typewritten words "Rock Island Plow Company, a Corporation," on the purported satisfaction of judgment; that he began to work for Rock Island Plow Company about six weeks previously, going first to Rock Island, and signed a contract of agency with that company, which he identified as Plaintiff's Exhibit A, and it was in the same condition as when he signed it, except for the word, "cancelled" written thereon; that after the execution of the contract on July 20th, he went to Indiana to start to work with an uncle named Thompson who showed him how to do the work; that they worked together around Galveston, Indiana, for about two weeks, and that the business was to collect accounts due to Rock Island Plow Company, but the company did not furnish them notes, but gave them a statement or a slip; and they would go to a farmer and collect on it or take some collateral security; that after leaving Thompson he went by himself for about a week; then came back to Galveston, went to Lafayette, and then to Rossville; that he had notations of certain notes; did not know whether the notes were made to E. C. Smith or Rossville Motor Company, and put up with Rock Island Plow Company as collateral security or not; that Rock Island Plow Company just gave him slips; did not see Smith when he first went to Rossville, but went to work on farmers. Defendants' Exhibits 1 and 2 were taken with collateral security and

whatever was realized from them was to be applied on notes; could not swear that he sent Defendants' Exhibits 1 and 2 to Rock Island; his mind was not clear and he did not know what happened to them, or where they came from; that he turned one or two contracts or some paper over to Smith; did not know where he signed Defendants' Exhibits 1 and 2; may have turned them over to E. C. Smith; did not turn them over until after he had signed the purported satisfaction of judgment; can not give the names of anyone else around Rossville that he collected any money from or took a bill of sale from; knows one party who paid money into the bank, where it went he does not know; he did not collect that; that was the case of a note; is not positive but rather inclined to think he did send in a bill of sale in the form of Defendants' Exhibits 1 and 2; could not have been many if there were any; sent these in as security for notes; that the purported satisfaction of judgment was drawn in duplicate, both were signed in Rossville; he took one and Smith took one; Acton and Acton at Danville prepared them. Smith took him down there. Understood Mr. Acton was Smith's lawyer. Mr. Smith took one and the other was given to witness who gave it, including two or three other papers, to Mr. Derksen at South Bend on November 11, 1933, is not just sure of the date; he never sent his copy to the company but retained it in his possession; never notified the company that he had signed such a paper that he remembers of. Mr. Acton also prepared a release to be signed by some executive officer of the Rock Island Plow Company; does not remember whether that was in three copies or four; that was turned over to Derksen just recently; he never notified the company of that before, or sent it to them before that he remembers; might have done it but does not recall doing it. When he went into the vicinity of Rossville he was a collector, did not have any notes against Gene Smith or any slip or any reference to this judgment which the company had against Smith; is not sure when he went there that he had been told not to do anything about the judgment, to be real candid about it, he does not know; can not say whether Smith first proposed turning machinery over to him. While working for the company he received accounts to work on by mail from the company at Rock Island; identifies Plaintiff's Exhibit B as one that he had in his possession, a copy of Plaintiff's Exhibit A; he had both in his possession at the time he turned it over to Mr. Derksen on November 11th. The paper marked Plaintiff's Exhibit C, with words and handwriting at top, "Harry H. Johnson" is a copy of this

purported agreement which witness made with Gene Smith, which he kept in his possession and the paper identified as Plaintiff's Exhibit B, marked at the top of said exhibit "Harry H. Johnson" and being four copies of a paper marked "Release of Judgment" is the paper that was drawn in Acton's office and given to him at the time this purported agreement was signed by Smith and Johnson. They were all kept in Johnson's possession up to November 11, 1933. He had a telephone conversation with Mr. Derksen, collection manager, of Rock Island Plow Company from Rossville to Rock Island on August 22, 1932 but he did not go to Rock Island; never went to Rock Island after that conversation, and never has been there since; that the only time he was ever there was the time he was hired; that he did go to Streater; that he did not work for the company any more after August 22, 1932; that he was waiting a settlement because he claimed the company owed him; that he waited at Streater a day or two then went home, to South Bend; that he never did notify the company in any way, shape or form, until he turned over the papers identified as Plaintiff's Exhibits C, D and E; that he had signed the paper with Gene Smith, called the purported satisfaction of judgment; he remembered that; that he was sure he mailed papers in to the company; that when the company got these papers he did not know what it did with them; that he did not know who the notes ran to that he got the slips on, or whether they were held as collateral; that all he did was to take bills of sale from such parties and send them in, in order to apply on the indebtednesses; that what he was doing was collecting money to apply on indebtednesses, and never had the notes of anybody; that he was getting all the security he could, sending it in, and the settlements were to be consummated between the Rock Island Plow Company and the people from whom he took the obligation; that he did settle some in full. The witness Elmer Clapp had taken a bill of sale from him on some oats stored in an elevator and when the oats were sold Fifty Dollars (\$50) of the proceeds were remitted to the Rock Island Plow Company and applied on a note of Seventy-Five Dollars (\$75) which Clapp had made to the Rock Island Plow Company and which Rock Island Plow Company was holding at the time. The witness gave a new note to the Rock Island Plow Company in the sum of Twenty-Five and 34/100 Dollars (\$25.34), being the balance of the old note and interest.

Defendants offered to prove that the original notes upon which judgment was taken were signed by the

defendant, Louise B. Smith, upon express promise by the plaintiff that the note would be satisfied only out of goods furnished E. C. Smith by plaintiff, and that after judgment was confessed plaintiff had entered into a contract in writing that it would not levy on any property of either defendant but would only take out execution to create and to preserve a lien on the personal property. This offer was refused.

Defendants offered to prove that Harry H. Johnson told defendant, E. C. Smith before the making of the contract releasing the judgment that he had settled with Delbert Hutsler and O. T. Evans and had sent the contract to the plaintiff and that he (Smith) relied upon this information before the execution of the purported satisfaction of judgment. This offer was refused.

Defendants offered to prove that the cost of all of the goods described in the purported satisfaction of judgment, being the same goods sold on execution, was Twelve Thousand Dollars (\$12,000), for the purpose of showing the amount of credit they were entitled to upon the judgment regardless of the effect of the purported satisfaction of judgment. This offer was refused.

An inspection of defendants' petition discloses that no mention is made therein of the matters and things set forth in defendants' first offer of proof; also that such matters and things would not be proper in a petition of this character, for such a petition will lie only where subsequent to the rendition of the judgment it has been paid and discharged and should be satisfied and discharged of record. (*Harding v. Hawkins*, 141 Illinois 573). The same objection lies as to the third offer to prove. Therefore, in our opinion the trial court properly refused both offers to prove. As to defendants' offer to prove, number two, it appears that this testimony was admitted as shown by abstract (37-38). The count limiting the proof to show good faith, but not to show agency. This ruling is correct. (*Merchants National Bank of Peoria v. Nichols & Shepard Co.*, 223 Illinois 41; *Proctor v. Tows*, 115 Illinois 138; *Mullanphy Savings Bank v. Schott*, 135 Illinois 655; *Alonzo Leonard v. B. Hevner*, 171 Illinois Appellate 188).

It appears from the record that but one issue was presented by defendants' petition and plaintiff's answer. This issue was: Has the judgment in this case been satisfied and discharged?

The only thing shown by petitioners to support their contention that the judgment has been satisfied and discharged is a document which has been heretofore

designated as the purported satisfaction of judgment; and which was offered in evidence as Defendants' Exhibit 5. The Court refused to admit this document. The character of the instrument, the manner that the same was secured, the circumstances surrounding its execution, and the disposition made of same thereafter have all been heretofore set forth.

Plaintiff's objection to the admissibility of this exhibit was that it was not competent, relevant, or material, and no qualification made for it whatsoever; that there had not been any proof E. C. Smith ever saw any of these previous bills of sale before the execution of it, and he could not have had knowledge of the taking of them because there was no evidence to show that he did know; that there was no evidence to show how these bills of sale, if they ever reached the Rock Island Plow Company, were treated by that company, or that Mr. Smith had any knowledge how it acted on it, and the agency and authority of this man being expressly denied in the pleading, (meaning Johnson); it appearing in evidence up to that point, there was a contract of agency signed, which would have to be admitted in evidence before this contract could be admitted in evidence if it could be admitted at all; and furthermore, it appearing from the testimony of Smith that he never asked Johnson for his letter of authority, or his instructions or anything at all.

The claim made by the defendants that E. C. Smith knew that Johnson had made contracts of settlement prior to the signing of Defendants' Exhibit 5 rests solely on the statement made by Johnson to Smith that he (Johnson) had settled the O. T. Evans and the Delbert Hutsler claims. This in no wise helps defendants to prove the agency of Johnson, or to place themselves in the position of having been misled by some act of the plaintiff because "An agent cannot confer power upon himself and therefore his agency cannot be established by showing either what he said or did." (*Proctor v. Tows, supra*) (*Mullanphy Savings Bank v. Schott, supra*). It is perfectly clear that anything that defendants learned after the signing of Defendants' Exhibit 5 as to any holding out of authority upon the part of Johnson could not have misled them at the time of the signing of Defendants' Exhibit 5, nor could they have relied on it at the time of the signing. No ratification of Johnson's act in the execution of this document has been shown or even attempted. It is further urged that the plaintiff permitted Johnson to so act as to have apparent authority to execute the contract in question and bind the principal. This must be de-

terminated solely by the acts of the principal, not by the acts of the agent. (*La Pointe v. Chevette*, 250 N. W. 272) (264 Michigan 482). The statement of the agent as to his authority is not competent. (*John Deere Plow Company v. Leeper*, 194 Illinois Appellate 92). Nowhere in the record is there any evidence that Smith knew anything about any settlements made by Johnson or his authority or the extent of it prior to the signing of Defendants' Exhibit 5, other than the statements made by Johnson himself, and on these he could not rely.

Our Supreme Court has said in *Merchants National Bank of Peoria v. Nichols & Shepard Co.*, 223 Illinois 41, "Parties dealing with an assumed agent are bound at their peril to ascertain not only the fact of the agency but the extent of the agent's authority. They are put upon their guard by the very fact that they are dealing with an agent, and must, at their peril, see to it that the act done by him is within his power." The holding was the same, and this doctrine affirmed, in *Paine v. The Sheridan Trust and Savings Bank*, 242 Illinois 342. Complaint is made because the trial court refused to admit the contract signed by Johnson in evidence. A contract signed by an agent is inadmissible in evidence against the principal without proof of the agent's express or implied authority to sign. This particular question was discussed in the case of *Fadner v. Hibler*, 26 Illinois Appellate 639. In this case an action was brought to recover an alleged balance due for commissions on sale of nursery stock. The contract which the agent sought to enforce against Fadner Brothers & Company was signed "Fadner Brother & Company, per M." "M" stood for "Meyers", a bookkeeper for Fadner Brothers, and the signature was in his handwriting. It was objected that Meyers had no authority to sign such contract. The lower court admitted the contract in evidence, upon a showing that on two occasions Meyers had drawn up and signed contracts embodying terms made by the principal, and had signed the contracts in the principal's presence and by his express direction. The admission of such contract was held to be error, the court saying: "It (the contract) purported to be signed by an agent and before it could be admitted against the principal proof should have been furnished of an express authority to sign or of authority implied from a holding out of the agent as authorized." For error in admitting the contract the case was reversed and remanded.

The record shows that the contract, Defendants' Exhibit 5, never was sent to the company and was deliv-

ered to an agent of the company in November of 1933. No ratification was shown. Defendants cite the case of *Faber-Musser v. William E. Dee Clay Mfg. Co.*, 291 Illinois 240. An analysis of the facts in that case show that they in no particular can be applied to the case at bar. Dee Clay Mfg. Co. maintained its only Illinois office at Springfield, which had been maintained for seven or eight years. Letterheads, with the corporate name, and the location of the office noted thereon had been used. The office was and had been for several years in charge of Matthew M. Dee, its agent. The controversy arose over a letter written in the name of the corporation by Matthew M. Dee offering brick for a certain price which was accepted. The Dee Company denied the authority of Matthew M. Dee. The Court held that the evidence showed such authority stating that from the maintenance of the office, the use of the letterheads, the lettering on the office, the requirement of the statute that the principal office of an Illinois corporation should be in this State, would justify a reasonable man assuming that the person in charge of that office had full control of the management and business of sales. Further the evidence also tended to show that Springfield agents of the Dee Company had frequently solicited orders from plaintiff.

Under defendants' point 10, the cases of *Phoenix Insurance Co. v. John Stock*, 149 Illinois 319, and *Hartford Insurance Company v. Willcox*, 57 Illinois 180, are cited as authority for the proposition that whether an agent is apparently clothed with authority to do a certain act is a question of fact to be determined by the jury. An examination of the Willcox case shows that there is no such holding by the court, and in the Stock cases merely that under the facts in that particular case it should have been submitted to the jury.

In our opinion the trial court properly refused to admit in evidence Defendants' Exhibit 5, which left the record barren of any proof whatsoever to support defendants' petition, and the Court properly instructed the jury to find for the plaintiff. For the reasons given the judgment of the trial court is affirmed.

Judgment affirmed.

(Sixteen pages in original opinion)

Abstract -
Opinion filed. October 10-1934

PUBLISHED IN ABSTRACT

7

**Illinois National Casualty Company, Appellant, v. Fred
Ollech, Minnie Kubish, and August Kubish,
Appellees.**

Appeal from the Circuit Court of Sangamon County.

APRIL TERM, A. D. 1933.

277 I.A. 631'

Gen. No. 8774

Agenda No. 35

MR. JUSTICE FULTON delivered the opinion of the court.

This is an appeal from a decree in favor of Appellees, who were defendants in a bill to foreclose a mortgage. On August 4, 1927, Fred Ollech, being indebted to Louis G. Coleman for the sum of \$3,000.00, made and delivered to Coleman, his note for that amount, due, five years after date and bearing interest at 6½% per annum, payable semi-annually, as evidenced by ten interest notes in the sum of \$97.50 each, and at the same time executed and delivered to Coleman, a mortgage securing said notes and indebtedness. The mortgage was recorded on the following day. Thereafter, on September 6th, 1927, Coleman sold and delivered said notes and mortgage to the Eastern Automobile Insurance Underwriters for the sum of \$3,015.00, being the principal sum of said notes and accrued interest.

In consideration of the payment of said sum, Coleman delivered to the Eastern Automobile Insurance Underwriters an assignment in writing of said notes and mortgage, together with all other papers connected with said loan, including abstract and insurance policies. Among said papers was a memorandum stating that the note of Fred Ollech was assigned to net six per cent interest; Coleman never regained possession of any of the papers belonging to said mortgage loan, except certain interest notes which were delivered to him after the same were paid.

The assignment of the mortgage to the Eastern Automobile Insurance Underwriters was not recorded until January 6, 1931 and no notice of the assignment was ever given to any of the Appellees by said Company or the Appellant. In April, 1931, a merger was completed between the Appellant and the Eastern Automobile Insurance Underwriters whereby Appellant acquired all of the assets of said Company, including the mortgage loan papers upon which this foreclosure is based. From August 4, 1927, down to March 26, 1930, the Appellee Fred Ollech, also the mortgagor,

paid to Coleman the sum of \$164.57 in excess of the interest and other charges on the loan, which sum was credited on the Coleman books to the principal indebtedness. The payments made by Ollech were made in varying amounts and at irregular intervals during that period of time. On March 26, 1930, Fred Ollech conveyed the real estate covered by the mortgage to the Appellees, Minnie Kubish and August Kubish, in consideration of the balance due on the mortgage indebtedness amounting to \$2,835.43. The deed recited a consideration of \$1.00 and stated it was "subject to the mortgage indebtedness now against said real estate". The transfer was made in Coleman's office and he prepared all the papers necessary for the conveyance. During the negotiations the Kubishes went to the Building and Loan Association and procured a check payable to Minnie and August Kubish in the sum of \$1,103.97. Back in Coleman's office the check was duly endorsed and delivered to Coleman to apply upon the mortgage indebtedness. It was Coleman's custom to issue pass books to parties making payments to his office and one was issued to Minnie and August Kubish upon the completion of the transfer. A credit of \$1,103.97 representing above payment is shown upon the pass book and upon the records of Coleman's office. Subsequently the Kubishes paid monthly installments to Coleman amounting to \$685.05, the last payment being made on December 30, 1930. On that date the pass book and the Coleman records showed the balance of the mortgage indebtedness to be the sum of \$1,476.00. From the payments made to him Coleman had paid off a certain judgment against Appellee Ollech. The sums received by Coleman from Appellees, as payment on the principal indebtedness were retained by him and appropriated to his own use. Coleman failed in January, 1931, and Appellees testify that up until that time they had no notice from Appellants or from any other source that Appellant was the holder of the mortgage and notes, and that they had dealt with Coleman ever since the transfer believing him to be not only the mortgagee but the owner and holder of the mortgage indebtedness against their property.

After the date of the assignment of the mortgage on December 6, 1927, up to January, 1931, Coleman collected the mortgage interest, retained $\frac{1}{2}$ % interest for himself and remitted the six per cent to Appellants semi-annually when due, at which time the interest coupons so paid were surrendered to Coleman.

The cause was referred to a Master in Chancery who found that the original mortgagor, Fred Ollech, was

entitled to notice of the assignment and payments made by him in good faith should be credited upon the principal debt; that Coleman was not the agent of the Assignee and that Appellant had no knowledge that payments had been made by Appellees to Coleman: that Minnie Kubish and August Kubish, as grantees of the mortgagors, were not entitled to notice of the assignment because they bought the property subject to the mortgage indebtedness, and were put on inquiry as to the actual ownership of the notes and mortgage; that there was due to appellant on the mortgage indebtedness the sum of \$2,835.43, plus accrued interest. Exceptions to the masters report were argued before the Circuit Court and in chief sustained by the decree of that court. It is from that decree this appeal is prosecuted.

Appellant contends that the Court erred in giving Minnie Kubish and August Kubish credit as against appellant for the payments made to Coleman, the mortgagee, after he had assigned the note and mortgage. It concedes that the rule in Illinois is that a subsequent holder of mortgage notes, in order to protect himself as against payments thereafter made in good faith to the original mortgagee, must give actual notice to the maker, or record the assignment; that otherwise, payments to the mortgagee without notice will be binding upon the subsequent holder. They assert however that such rule has been limited to cases where the property is still owned by the mortgagor, and that as to purchasers of the mortgaged, premises who take subject to the mortgage, there is no duty on behalf of the assignee to give notice, but such purchaser of the premises must see to it that he pays the debt to the legal holder of the note.

As authority for this contention Appellant relies chiefly on the case of *Schultz v. Sroelowitz*, 191 Ill. 249. In that case one Krasa made his promissory note for \$4,500.00, payable to himself and endorsed the same in blank and delivered the note to Schintz. A trust deed to Schintz was given to secure the note. Schultz bought the note and trust deed from Schintz, without taking any separate assignment of the deed of trust and did not give Krasa any notice of the purchase or transfer. The property was conveyed by Krasa to one Miller who in turn conveyed to Lieb and Anna Sroelowitz, and by each deed the grantees assumed and agreed to pay the mortgage indebtedness as a part of the purchase money. Interest was collected by Schintz and remitted to Schultz. Six months before the note was due Schintz notified Sroelowitz of that fact and the latter arranged to pay \$800.00 on the principal and execute a new note and Trust Deed for \$3,700.00 which

was done. Schintz appropriated the payment to his own use. When the new papers were executed Sroelowitz asked to have the old papers cancelled and for clearance papers. Schintz held them up and pretended to tear up the note and mortgage but finally did place a release of the Trust Deed of Record. The suit was brought by Schultz to foreclose the trust deed, which with the note had been assigned to him by Schintz. The Court held that it was a case which was the outgrowth of a fraudulent transaction of Schintz resulting in a loss to one of two or more innocent parties and said "It is often a difficult matter in such cases to determine upon which of such parties the loss should fall."

"It is well settled that the mortgage was assignable only in equity, and that in a proceeding to enforce the lien created by it, it is subject to all equitable defenses existing between the original parties but not to the latent equities of third persons". However the Court further said that "the fact that Schintz declined to cancel and deliver to them the note and deed of trust on their request but destroyed them instead, should have been sufficient to arouse their suspicions as to his good faith in the transaction and to put them on their guard. Ordinary care, under the circumstances, would have required them to procure some competent person to look into the matter for them". Under these circumstances they were, at their own peril, bound to pay the debt to the one entitled to receive it. The Court also held that there was no proof that Schintz was the agent of Schultz and payments to Schintz were not payments to Schultz. In the present case the situation was somewhat different. Coleman was the mortgagee named in the mortgage and there was nothing in the transactions with him which would tend to arouse suspicion or place the Kubishes on inquiry. Appellant had a written assignment of the mortgage which they withheld from recording for over three years. They had notice that the notes bore $6\frac{1}{2}\%$ interest; that they had purchased them to net six per cent and that therefore Coleman had an interest in a portion of the interest paid on the notes. Knowing this they impliedly accepted Coleman as an agent to collect the full amount of the interest, retain $\frac{1}{2}\%$ for his commission and remit them the balance. We believe that such facts distinguish this case from *Schultz v. Sroelowitz* and that the decree of the Circuit Court was correct and should be affirmed.

Affirmed.

(Six pages in original opinion)

Published in Abstract

James Robert Cotton, by Alva Cotton, his next friend,
Appellee v. Esther Balsley, Appellant.

Appeal from Circuit Court Vermillion County.

JANUARY TERM, A. D. 1934.

277 I.A. 631²

Gen. No. 8794

Agenda No. 4

MR. JUSTICE FULTON delivered the opinion of the Court.

Appellee, a child eight years of age, by his next friend, brought suit in the Circuit Court of Vermillion County against Appellant to recover damages for an injury received from being struck by an automobile driven by the Appellant, Esther Balsley. There was a verdict and judgment in the sum of \$1500.00, from which Appellant has appealed.

The declaration charged general negligence. The testimony developed the following facts: On the evening of May 3, 1930, the plaintiff and several other children were playing hide and seek on the west side of Jackson Street in the City of Danville. Jackson Street is paved, runs north and south, and is about thirty-three feet wide, with sidewalks on both sides. The accident happened on Jackson Street at about 8:30 P. M. in the block between Fairchild and Woodbury Streets, two east and west streets intersecting Jackson Street. On the east side of this block the high school and grounds occupy the entire block. The west side is built up solidly with houses. Plaintiff lived with his parents in about the middle of this block on the west side of the street.

Adjoining plaintiff's residence on the north was the Hirschler home, and north of that was an unpaved alley running east and west. A street light was burning at the intersections with Jackson Street at both ends of the block. An entertainment was going on at the high school that night so that the building was lighted and a double row of automobiles was parked on the east side of Jackson Street close together and a few cars were parked farther north on the West side of the street.

A tree in the front yard of the Hirschler house served as base. Lawrence Hirschler was "it", and the plaintiff and his brother Freeman Cotton went across to the east side of Jackson Street, and hid behind some bushes located east of the sidewalk on the east side of the street and in a diagonal position south-

east from the Hirschler home. Lawrence finished counting, after which three or four of the children had been caught or got in free. The plaintiff waited until Lawrence got out of sight, and then ran fast across the street to get in free. The plaintiff, his brother and Margaret Jackse, all testified that plaintiff looked both ways after passing through the double row of cars before crossing the street. Plaintiff testified that he did not see Appellant's car until it hit him. He was struck by the right front bumper of the car driven by Appellant when within a few feet of the west curb. Appellant, prior to the accident, had been at Dew Drop Inn, three miles southeast of Danville, with Dorothy West and her mother, Mrs. Mary Ellen West, where the three of them had gone to eat. They started back shortly after seven, when it was getting dusk. Appellant was driving, with Miss West beside her in the front seat, and Mrs. West in the back seat. They all testified that Appellant turned on the lights to the car when she started and that they remained on until after the accident. They were not going any place in particular, but were just taking a pleasure drive. They drove east on Fairchild Street to Jackson Street and turned south. She further testified that when she turned the corner at Fairchild and Jackson Streets, they were going between eight and ten miles an hour, and they continued on at that speed until the time of the accident. Neither the Appellant nor the other occupants of the car saw the plaintiff until he was hit. Appellant testified she did not know where he came from. The car was brought to a stop within its own length, and at that time the plaintiff was lying on or near the west curb of Jackson Street, within a foot or two of the right rear wheel. Appellant testified that immediately before the accident, defendant met a car going north, which had lights on, and which had just passed when the accident happened. Freeman Cotton testified that he could see Appellant's car and that there were no lights burning on it and that there was no other car on the street going in either direction. Appellant further testified that she was looking straight ahead just before the accident, that she had driven cars for eight years and that the brakes were in good condition.

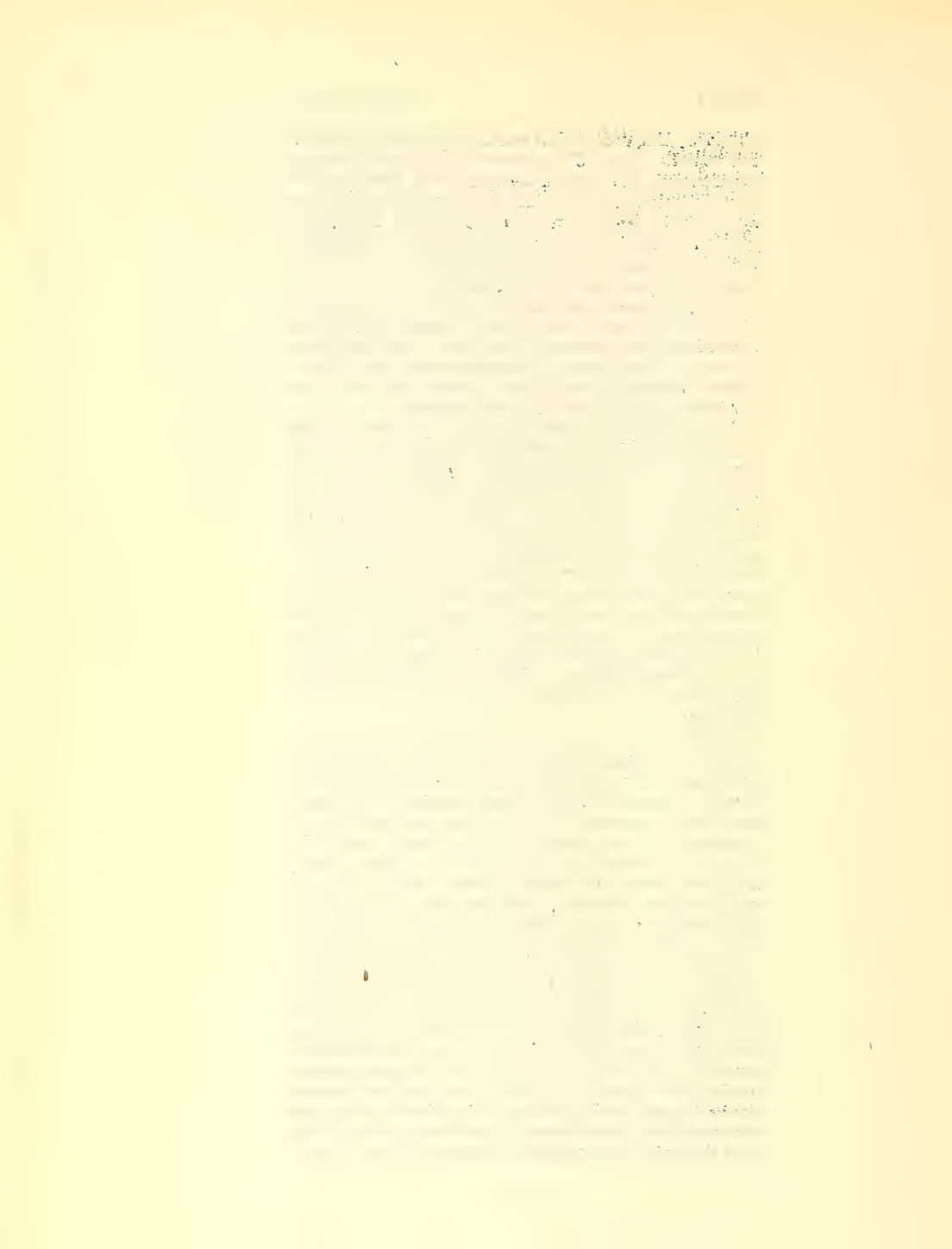
Plaintiff was taken to the Hospital accompanied by a cousin and wife and placed under the care of a surgeon. He had a fractured leg and remained in the hospital for a period of ten weeks. He suffered a great deal of pain and needed a large amount of surgical attention, but fairly good results were finally

obtained. The doctors bill was \$225.00 and the hospital bill \$210.55. Mrs. Cotton, wife of plaintiff's cousin, testified that she and her husband went with plaintiff to the hospital, at which time Appellant stated that she saw children playing in the street just as she turned off from Fairchild Street onto Jackson. Appellant, Miss West and Mrs. West all positively deny that Appellant made any such statement.

A city ordinance of the City of Danville provides "Pedestrains shall cross street at street or alley intersections only: and in a direction at right angles to the curb of said street. No pedestrian shall cross a street diagonally at any street intersection within the corporate limits of said City of Danville".

An appeal from a prior verdict and judgment in this case was hertofore considered by this Court and the cause reversed and remended to the Cireuit Court for a new trial. (*Cotton v. Balsley*, 264 App. 635). On that hearing this Court reviewed the testimony and held that the verdict and judgment were manifestly against the weight of the evidence. The Appellant contends that the evidence in this case is practically the same as on the former hearing and that the ruling of this Court upon that record has become the law of the present case. If the evidence is the same or substantially the same upon the retrial, this Court must adhere to its former decision. *Gillum v. Central Ill. Public Service Co.*, 250 App. 617. *Ames v. Armour & Co.*, 257 App. 449.

But the Appellee urges that if further material evidence is introduced on the second trial, the trial and appellate courts are not bound to follow the rules laid down in the opinion filed on the first appeal, but should apply such principles of law as are applicable to the case made on the second trial citing *Penn. Pate Glass Co. v. J. H. Rice & Co.*, 216 Ill. 567. In order to bring this case within that rule Appellee insists that new and material testimony was introduced as follows: That Freeman Cotton testified there was no other car in the block moving north just before the accident. James Robert Cotton, the appellee, testified there were no other cars coming. Again Appellee insists that the testimony of Appellant shows that she was sitting angle-wise while driving and carrying on a conversation with persons to her right and rear, which did not appear in the record of the first trial. On direct examination, the appellant testified that she was looking straight ahead while driving and while she admitted she might have been talking to her companions it was only through the astuteness of counsel on cross exam-



ination and in his own words that she admitted sitting angle-wise as she drove along. The other changes or additions to the testimony noted by Appellee are strictly minor ones and not at all material. We do not deem the record in this trial to be substantially or materially different from the evidence presented to this Court on the first appeal and therefore the trial court should have directed a verdict in favor of Appellant.

The judgment of the Circuit Court of Vermillion County is therefore reversed.

Judgment Reversed.

Five Copies in Original Opinion

Abstract filed - 10-1934

PUBLISHED IN ABSTRACT

5 H

Leonard Johnson, Appellee, v. Estate of ^RHarley Ray,
Deceased, Appellant.

Appeal from Circuit Court Court Vermillion County.

JANUARY TERM, A. D. 1934.

277 I.A. 631³

Gen. No. 3814

Agenda No. 10

MR. JUSTICE FULTON delivered the opinion of the Court.

This an action brought by Leonard Johnson, Appellee, against the estate of Harry Ray, deceased. The claim is based upon a promissory note, purporting to have been executed by the deceased on October 6, 1931, payable to one Chan Queen, for the principal sum of \$850.00, due ninety days after date and bearing interest at the rate of seven per cent per annum. It is claimed by Appellee that the consideration for the note was the purchase price of a certain stallion at the price of \$710.00 and three steers and a heifer at \$35.00 each. The note was assigned to claimant Leonard Johnson, by payee, on April 1, 1932, about three months after the note became due. Appellant filed an affidavit in the case denying the execution and delivery of the note in question. The Appellant also contends there was no consideration whatever for the giving of the note. The deceased was accidentally killed in an automobile accident on October 20, 1931. The claim was filed in the probate court and objected to by the Administrator. A trial was had in that court before a jury and resulted in a verdict for the Appellee. A motion for new trial was granted by the probate court on the ground of newly discovered evidence. A jury was waived on the second trial and the court requested to decide the case on the record made. His decision was against the claimant who is the Appellee in this Court. On appeal the case was tried de novo in the Circuit Court before a jury and verdict rendered for Appellee in the sum of \$850.00. Judgment was entered on the verdict, from which this appeal is prosecuted.

Appellee introduced in evidence on the trial the testimony of three witnesses in addition to the payee of the note, two of whom testified they had been present and heard Chan Queen and the decedent discuss the sale of the horse and the cattle. The third witness, a brother of Chan Queen, testified that the decedent told him about the purchase of the horse and the cattle

from his brother. He also testified to the payment of \$140.00 to the decedent by his brother, represented by a receipt admitted in evidence which recited that it was a payment in cash to apply on Fidelity Loan Co., and that he signed his name on the receipt as a witness. The stallion sold by Chan Queen to the decedent had been subject to a Chattel Mortgage for the sum of \$300.00 to the Fidelity Loan Co. The Appellant's testimony disclosed a somewhat peculiar set of facts aimed to show a failure of consideration.

After the death of the decedent, Harry Ray, the stallion was found on the premises of Chan Queen by the Administrator and his attorney who were told that Queen had an arrangement with the decedent to keep the horse on the place until June 1932. They were further told that the deal was made in the early part of September 1931, although the note was not dated until October 6th of the same year. They also developed that the three steers had been originally sold by Chan Queen to one Herbert Hammerton sometime in August 1931, and during the same month Hammerton traded them back to Queen: that early in September the steers were sold by Chan Queen to one Roy Lee. They further proved that on February 10, 1931, Chan Queen had given a chattel mortgage on the stallion in question to the Fidelity Loan Co. to secure a note for the sum of \$300.00, due August 10, 1931, with interest at the rate of 2½% per month: that said note was extended by affidavit to February 10, 1932: that when the note became due, the mortgage was foreclosed for failure of payment and the stallion sold at public sale: that it was bid in by one A. C. Droll for the appellee, Leonard Johnson, and turned over to him. No proof was introduced in support of the affidavit denying the execution and delivery of the note. The circumstances surrounding this transaction are somewhat strange and rather extraordinary but they have twice been submitted to the consideration of a jury and in each instance a verdict has been returned in favor of the Appellee claimant. The verdict of a jury ought not to be disturbed by a trial court where the questions of fact are in conflict and both parties have had an opportunity for a fair trial unless the decision of the jury is manifestly against the weight of the evidence. *Belden v. Innis*, 84 Ill. 78.

Appellant urges that the Court erred in refusing to admit testimony as to the financial condition of the decedent and that he was prompt and careful in the payment of his debts, and cites the case of *Thorp v. Goewey*, Admr., 85 Illinois 611 in support thereof. In that case the note had been given by the decedent

seventeen years before his death and such evidence was held competent, but in this case where the note was given only sixteen days prior to death the reasoning of that case does not apply. The Appellant also contends that the testimony of Chan Queen as to conversations held with Appellant and his attorney subsequent to the death of Harry Ray, was improperly admitted. Also that the Court improperly refused to admit testimony tending to prove facts concerning the previous trial in the probate court. These objections are without merit, as are the objections to the giving and refusing of instructions. Finding no substantial error in the record and feeling that we are not warranted in disturbing the issues of fact found by the jury, the judgment of the Circuit Court is therefore affirmed.

Affirmed.

(Three pages in original opinion)



